Durkheim and the Law

Edited by
Steven Lukes and Andrew Scull

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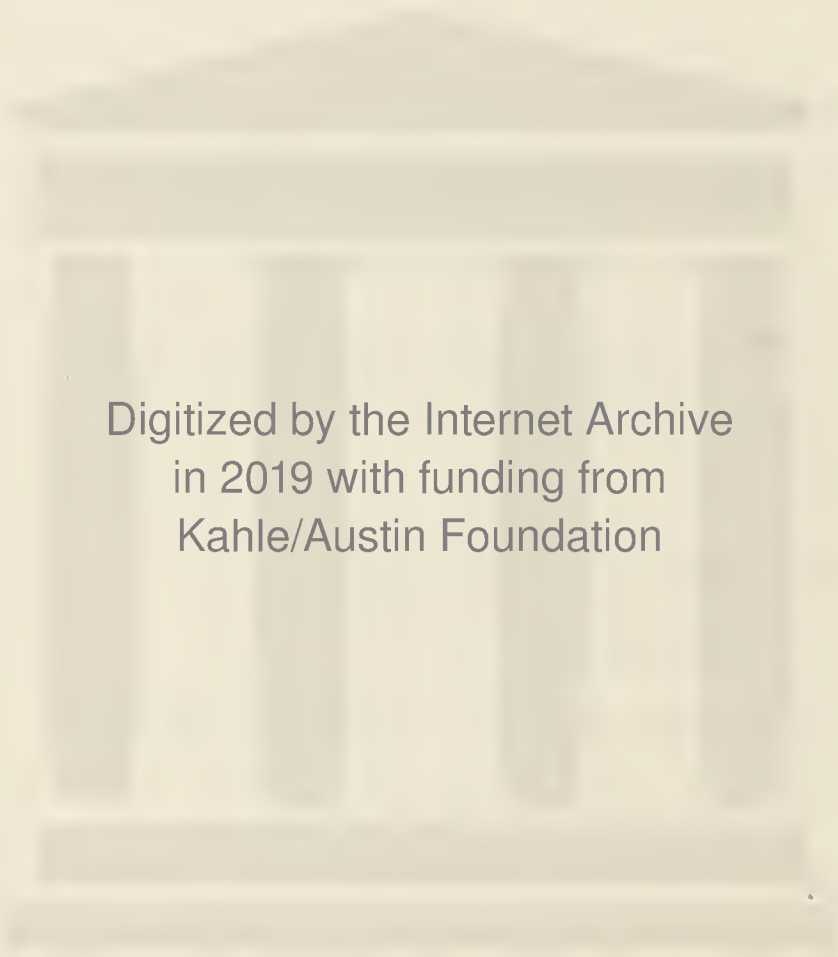

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Preface

While law was a subject of central importance to Durkheim and his followers (as we will show in our Introduction to this volume), Durkheim's writings on law were scattered throughout his work, generally appearing in analyses devoted to other topics. Moreover, a number of essays dealing with the sociology of law have hitherto remained untranslated and are thus largely unknown to an English-speaking audience. We have therefore brought together the more significant of his writings on law, organizing them under broad subject-headings; and in our introduction we have sought to provide a critical assessment of the strengths and limitations of Durkheim's work in this area and of the extent to which it is still of value to sociologists today.

Andrew Scull wishes to thank the Guggenheim Foundation for support during the concluding part of his work on this book.

We are most grateful to Dr Halls for providing, at our request, the relevant pages from his forthcoming translation of *The Division of Labour in Society*.

Introduction

Steven Lukes and Andrew Scull

Law was a topic of central interest to Durkheim and to his followers. In his first major work, *The Division of Labour in Society*, Durkheim advanced three bold and striking hypotheses about law. The first concerned how law should be conceived – as an 'external' index which 'symbolizes' the nature of social solidarity.[1] The second concerned its evolution, as societies developed from less to more advanced forms, from an all-ecompassing religiosity to modern secularism, and from collectivism to individualism. It postulated an overall shift from a predominantly penal law with 'repressive organized sanctions' to the prevalence of 'civil law, commercial law, procedural law, administrative and constitutional law' with 'purely restitutory' sanctions.[2] The third hypothesis concerned its functioning, above all in the context of crime and punishment, and claimed that crime is a violation and punishment an expression of collective sentiments and that punishment's 'real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour'.[3]

These hypotheses were fundamental to Durkheim's own further work in the sociology of law, and indeed elsewhere,[4] and the same may be said of the work of his followers. He never ceased to see law *systematically*: 'the diverse juridical phenomena', he wrote, 'are not isolated from one another; rather there are between them all manner of connections and they are linked with one another in such a way as to form, in each society, an *ensemble* which has its own unity and individuality'.[5] He devoted a special section of his remarkable journal, the *Année sociologique* (12 volumes 1898–1912), to 'the analysis of works where the law of a society or social type is

studied in its entirety',[6] and always in such a way as to reveal principles of social organization and collective thinking. Similarly, he pursued his evolutionary inquiries, particularly into the law against suicide (*Suicide*)[7] and into the development of punishment ('Two laws of penal evolution')[8] of property rights and of contract (*Professional Ethics and Civic Morals*).[9] These inquiries gained an added dimension after Durkheim's turn, from 1895 onwards, towards the study of religion and the ethnography of primitive societies, which was governed by his preoccupation with the religious origins of all social phenomena.[10] In line with this, in 1896, Durkheim's nephew Marcel Mauss published his seminal article '*La Religion et les origines du droit pénal*'[11] in which he advocated studying the origins of law through the use of ethnographic data. This approach strongly influenced other Durkheimian works in this field, notably Paul Fauconnet's study of penal responsibility,[12] Georges Davy's study of the potlatch and the origins of contractual obligation,[13] the writings of Huvelin on magic and the law,[14] and Emmanuel Lévy's work on responsibility and contract.[15] Finally, Durkheim restated his distinctive theory of crime and punishment in such a striking way that he provoked a most illuminating and interesting debate with Gabriel Tarde, the noted magistrate, criminologist, statistician and sociologist who became one of Durkheim's most formidable intellectual opponents. We reproduce this debate in Chapter 3.[16]

The *study* of law, then was central to The Durkheimian enterprise. As he claimed in 1900: 'Instead of treating sociology *in genere*, we have always concerned ourselves systematically with a clearly delimited order of facts: save for necessary excursions into fields adjacent to those which we were exploring, we have always been occupied only with legal or moral rules, studied in terms of their genesis and development.'[17] Legal practices, institutions, and systems were, for him, social facts[18] revealing wider social developments and processes, and eminently worthy of study in their own right, both historically, in the quest for their 'origins' and sociologically, in the examination of their functioning. Two sections of the *Année* were devoted to these tasks: that on 'Legal and Moral Sociology' to the former, that

on 'Criminal Sociology and Moral Statistics' to the latter. A mass of contemporary scholarly work was analysed in these sections, to which over half (24) of the Durkheimians contributed.[19] Taken together with the original works mentioned in the previous paragraph, this represents a substantial and distinctive contribution to the sociology of law.

What, then, was distinctive about the Durkheimian view of law – on what did it focus, and what did it neglect? To what main criticisms is Durkheim's sociology of law liable? What is its lasting contribution in the light of the contemporary study of law and legal phenomena? In offering some answers to these questions, we shall concentrate on Durkheim's own writings on law, gathered here, and in particular in Chapters 1–3, on the three master hypotheses from which all else flowed.

THE DURKHEIMIAN VIEW OF LAW

We should first note that the object of the *sociologie du droit* or *sociologie juridique* was, indeed, *droit* and that this is only imperfectly translatable as 'law'. As H. L. A. Hart has written, *droit* along with the German *Recht* and the Italian *diritto*

> seem to English jurists to hover uncertainly between law and morals, but they do in fact mark off an area of morality (the morality of law) which has special characteristics. It is occupied by the concepts of justice, fairness, rights and obligation (if this last is not used as it is by many moral philosophers as an obscuring general label to cover every action that we ought to do or forbear from doing).[20]

This linguistic fact combined with Durkheim's lifelong preoccupation with morality and its scientific study (to which the *Division of Labour* was intended to contribute)[21] to focus his attention upon the linkages, analogies and parallels between legal and moral rules. He tended to see law as derivative from and expressive of a society's morality. Indeed, one way to state the central thesis of *The Division of Labour*, of a great transition from mechanical to organic solidarity, is in the form of a three-fold claim: that the integrative functions

once performed by 'common ideas and sentiments' were now, in industrial societies, increasingly performed by new social institutions and relations, among them economic ones; that, since 'social solidarity is a wholly moral phenomenon',[22] this change involved a major change in the nature of morality; and that this was best observed through observing changes in the law.

Durkheim not only linked law and morality in these ways, he also focused on certain aspects of law, above all, its constraining or what has been called its 'negative, obligatory and prohibitive aspects'.[23] One general reason for this can be traced back to Durkheim's very definition of social facts (of which he saw legal rules as paradigmatic instances) in terms of *constraint*, controlling, giving direction and setting limits to individual action.[24] Laws *command*, and are a pre-eminent demonstration of Durkheim's favourite theme, the force and power of the social: 'the individual finds himself in the presence of a force which dominates him and to which he must bow'.[25] Hence, perhaps, his particular interest in sanctions, and in the study of penal law.

He distinguished law from morality by pointing to its 'organized' rather than 'diffuse' character and its dependence upon specific persons and institutions who interpret legal rules and apply sanctions according to recognized procedures. He always tended, however, to regard these persons and institutions as in turn embodying and applying '*représentations collectives*', collective beliefs and sentiments of 'society' as a whole; he never treated them as having distinctive interests and goals that might conflict both with one another and with the wider social consensus. Vogt is right to notice that Durkheim and the Durkheimians 'had a (largely unwitting) tendency to be "statist" in their definition of law',[26] but we should further note that the Durkheimian view of the state was as 'a special organ whose responsibility it is to work out certain representations which hold good for the collectivity. These representations are distinguished from the other collective representations by their higher degree of consciousness and reflection.'[27] Only once, and briefly, did Durkheim attempt to come to grips with the independent role of political action and political structures: in 'Two Laws of

Penal Evolution', he allows that governmental authoritarianism could influence the intensity of punishment, but he saw this as secondary to the influence of social-structural factors and without wider implications. So he did not investigate further the impact upon the functioning of law of politics, or even that of legislators, judges, the police and the courts.

In short, Durkheim's distinctive view of law focused upon its links with morality, deriving from it and expressing it, upon its constraining or negative aspects and upon its organized character, but without examining the independent explanatory role of the actors and institutions that combine to influence, create, interpret and apply it. Weber's emphasis on the impact on the law of the specialist bearers of legal tradition and their characteristic modes of recruitment and training, his lengthy examination of the relationships between law and domination, his inquiry into the connections between law and the economy,[28] are all domains of inquiry which are not merely absent from the Durkheimian corpus, but are indeed fundamentally incompatible with Durkheim's most basic metatheoretical assumptions.

CRITICISMS OF DURKHEIM'S SOCIOLOGY OF LAW

Law and social solidarity

The most general line of criticism follows directly from this summary of Durkheim's view of law: that it was remarkably narrowly focused. In taking social solidarity to be 'a completely moral phenomenon', and law to be an 'external index which symbolized it', he closed off a number of important sociological questions about law.

First, there are, it is true, significant links between morality and law: laws *often* reflects moral beliefs and sentiments and can serve to revive and reinforce them; and there is *often* a moral commitment to conform to what the law enjoins. Durkheim, however, wants to go further than this. He recognizes that 'social relationships can be forged without necessarily taking on a legal form'[29] but then hastens to assure us that this is essentially irrelevant for sociological analysis,

since 'normally customs are not opposed to law; on the contrary they form the basis for it'.[30] Deviations from this state of affairs are no more than temporary (and 'pathological') aberrations. Since custom is 'secondary' and law 'essential' to the constitution of social solidarity, law may safely be treated as an undistorted reflection of society's collective morality: 'Social life', wherever it becomes lasting, inevitably tends to assume a definite form and become organized. Law is nothing more than the most stable and precise element in this very organization. Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus we may be sure to find reflected in the law all the essential varieties of social solidarity.'[31]

For all Durkheim's dialectical skill, this whole line of argument rests exclusively on bluster and *a priori* assertion. He begs, in a characteristically Durkheimian fashion, [32] the very question at issue, and at once seeks to distract attention from this manoeuvre by proceeding directly to an empirical analysis of the changing forms of social solidarity as reflected in the legal system. Nor does his subsequent work on law bring any modification of this basic assumption.

Thus, as Vogt has well said, the Durkheimians 'slighted the importance of conflict: between moral principles, between laws, and . . . between legal and moral rules'.[33] This was an underlying feature of Durkheim's thought as a whole: he assumed that 'normally' the elements of a social order were integrated and 'solidary' and he saw conflict as pathological and transitory. He was certainly aware of such conflicts: witness his comments (at the end of chapter 8) on class exploitation and conflict and the injustice (relative to prevailing morality) of inherited property. He also argued at the time of the Dreyfus Affair that outrages against an individual's rights, such as the court had committed against Dreyfus, could not 'be freely allowed to occur without weakening the sentiments they violate: and as these sentiments are all we have in common, they cannot be weakened without disturbing the cohesion of society'.[34] Notwithstanding such periodic acknowledgments, however, he never focused as a sociological analyst upon moral conflicts within societies or on the various ways in which the law and

prevailing morality can come into conflict with each other. This constitutes a crucial and highly damaging deficiency, and yet, as we shall suggest below, to have taken such conflicts seriously would have been to question the basis of the Durkheimian vision of the human sciences, undermining his own way of conceiving 'a sociology that is objective, specific, and methodical'.[35]

Second, Durkheim's focus on the negative or constraining aspects of law, on sanctions and obligations, precluded any systematic inquiry into its positive or enabling aspects, as a set of procedural rules, permitting individuals and groups to act in certain ways, and constitutive rules, defining practices and relationships (for example, drawing up a will or forming a company).[36] There is no doubt, however, that these were aspects of the law which he recognized.[36] Consider his (rather obscure) discussion, not reproduced here, of the ways in which, as the division of labour, of functional interdependence, grows in societies, regulative norms (including laws) arise which in turn facilitate the further growth of the division of labour.[37] But it is note-worthy that his interesting discussion, included here, of property and contract law, focuses entirely on genetic explanations of their obligatory force and not at all on their enabling consequences. (The characteristic absence of concern with such matters contrasts sharply – and unfavourably – with Weber's rich and detailed discussion of the influence of legal systems in facilitating or retarding the development of modern capitalism.)[38]

Third, as we have already indicated, Durkheim (and the Durkheimians followed him in this) was curiously blind to the sociologically explanatory significance of *how* law is organized – that is, formulated, interpreted and applied – of the role of the 'intermediaries' between 'society' and 'its' legal rules and practices. (Again, Weber's approach to these issues is far more sophisticated and suggestive: compare, for example, his analysis of the dominant role of the organization of the English legal profession, in the context of early political centralization, in the preservation and development of a unique common law system of 'a highly archaic character', in the face of 'the greatest economic transformations'.)[39] For Durkheim, the State, as the instrument through which collective morality

finds durable expression and the organ 'qualified to think and act instead of and on behalf of society',[40] is the agency through which the 'passionate reaction' of the community finds organized response. Although, in many instances, within the State apparatus, 'power was held by a privileged class or by special magistrates . . . . [and] although the feelings of the collectivity are no longer expressed save through certain intermediaries, it does not follow that these feelings are no longer of a collective nature just because they are restricted to the consciousness of a limited number of people'.[41] On the contrary, these 'special officials' constitute the executive committee, not of a ruling class, but of the moral consensus of society as a whole; they are the authorized 'interpreters of its collective sentiments'.[42]

These 'interpreters' add nothing distinctive in the process of translating 'social representations' into law. In mysterious fashion, they constitute 'a mere cypher without effects'.[43] Thus, as admirably stated by Henri Lévy-Bruhl, the Durkheimians embraced the curious position that 'for the sociologist, the true author of a legal rule' is much less the individual who writes it and much more the 'social group'; the legislator merely 'translates the aspirations' of the social group.[44] It is probably not too much to say that, in making this assumption of 'immediate and unambiguous translatability',[45] Durkheim and the Durkheimians closed off most of the questions that have been central to the modern sociology of law, criminology, and the study of deviance.

The evolution of law

This is not the place to discuss Durkheim's overall evolutionary scheme relating the less advanced to the more advanced societies, though it should be noted that his picture was less simplistic and unilinear than that presented by many other nineteenth-century thinkers. Nor can we here discuss his later assumption that contemporary 'primitive' societies, as observed by travellers, missionaries and ethnographers, embodied both (structural and cultural) simplicity and evolutionary priority, and could thus provide evidence of the 'origins' of social institutions. Nor, again, can we examine

Table 1 Mechanical and Organic Solidarity[46]

	Mechanical solidarity based on resemblances (predominant in less advanced societies)	*Organic solidarity* based on division of labour (predominant in more advanced societies)
(1) Morphological (structural) basis	Segmental type (first clan-based, later territorial) Little interdependence (social bonds relatively weak) Relatively low volume of population Relatively low material and moral density	Organized type (fusion of markets and growth of cities) Much interdependence (social bonds relatively strong) Relatively high volume of population Relatively high material and moral density
(2) Type of norms (typified by law)	Rules with repressive sanctions Prevalence of penal law	Rules with restitutory sanctions Prevalence of cooperative law (civil, commercial, procedural, administrative and constitutional law)
(3a) Formal features of *conscience collective*	High volume High intensity High determinateness Collective authority absolute	Low volume Low intensity Low determinateness More room for individual initiative and reflection
(3b) Content of *conscience collective*	Highly religious Transcendental (superior to human interests and beyond discussion) Attaching supreme value to society and interests of society as a whole Concrete and specific	Increasingly secular Human-oriented (concerned with human interests and open to discussion) Attaching supreme value to individual dignity, equality of opportunity, work ethic and social justice Abstract and general

Durkheim's grand substantive hypothesis of the great transition from pre-industrial to modern industrial societies consisting in a shift of the principles of social integration from mechanical to organic solidarity: the respective elements of these ideal types are set out in table 1.[46] As far as law is concerned, the chief criticism to which his evolutionary thesis has been subject is two-fold: (i) that he vastly overstated the role of repressive law in pre-industrial societies and its insignificance in industrial societies; (ii) that, in developing a model of social change that lacks any consideration or 'conception of intermediate stages between primitive and modern society . . . . he misses many of the distinctive features of modern legal evolution'.[47] Plainly, Durkheim erred in 'crushing all pre-industrial societies into one category'.[48] The error was a profoundly damaging one, since it left his analysis bereft of more than passing attention to historical developments crucial to the understanding of the nature of modern legal systems. As for his thesis about the changing role of repressive law, let us examine in turn each of the claims he makes.

Pre-industrial societies. Consider first the ethnographic record. According to Durkheim, 'As far as we can judge of the state of law in very inferior societies, it appears to be entirely repressive.'[49] As Sheleff has noted, Malinowski's research in the Trobriand Islands stressed the reciprocity of their social relations and the secular basis of their legal system.[50] Malinowski himself wrote that these societies: 'have a class of obligatory rules, not endowed with any mystical character, not set forth in the name of "God", not enforced by any supernatural sanction, but provided with a purely social binding force'.[51] 'The rules of law', he wrote, 'stand out from the rest in that they are felt and regarded as the obligation of one person and the rightful claims of another.'[52] Hoebel argues similarly with regard to the reciprocal and restitutory features of primitive law, as do Gluckman, Bohannan, and others.[53] Schwartz and Miller, on the basis of a survey of 51 societies, conclude that 'restitutive sanctions – damages and mediation – which Durkheim believes to be associated with an

increasing division of labour, are found in many societies that lack even rudimentary specialization'.[54] In short, it is hard to disagree with Barnes's conclusion that 'the ethnographic evidence shows that, in general, primitive societies are not characterized by repressive laws' and that 'it is governmental action that is typically repressive'.[55] As Barnes remarks, at this stage, Durkheim 'took his evidence on legal order from classical antiquity and early Europe' which perhaps give proof of 'some historical progression of the kind he had in mind'.[56] In order to discover if this is so, we should look more closely at the evidence Durkheim relied upon.

Sheleff has noted that Durkheim appealed to Biblical evidence, arguing that in the Pentateuch there are very few non-repressive laws, and even these 'are not as foreign to penal law as may appear at first glance, for they all bear the mark of religion'.[57] This was intended to illustrate the religious basis of early penal law, oriented to a transcendent power, symbolizing the collectivity. A number of scholars have, however, argued exactly the contrary: that the Torah basically embodied religious and moral exhortations devoid of punitive backing, and existed alongside a legal system distinct from religious affairs and invoking restitution for secular offences.[58]

As for Classical Antiquity, here too the contrary view to Durkheim's has been maintained, not least by an authority on whom Durkheim himself relies – Sir Henry Sumner Maine. According to Durkheim, restitutory and cooperative law had made its appearance with the Roman Twelve Tables, but penal law still predominated. Maine, however, argued the direct opposite: that 'the penal law of ancient communities is not the Law of Crimes; it is the Law of Wrongs, or, to use the English technical word, of Torts. The person proceeds against the wrongdoer by an ordinary civil action, and receives composition in the shape of money-damages if he succeeds'.[59] According to Maine, repressive, vengeful action on behalf of the community was only taken in exceptional and serious cases. More recently, Diamond has argued that early law accentuated civil law and that it was the criminal law that developed out of the law of tort.[60]

The evidence from early modern Europe would also seem directly to contradict Durkheim's thesis. Lenman and Parker[61]

have forcefully maintained that the picture of criminal legal practice in early modern Europe was one of the barbarous punishment of certain crimes (witchcraft and heresy, patricide and infanticide, incest and sodomy, arson and murder – that is homicide done in secret, by stealth or by premeditation) and the composition of others, in the form of arbitrated extra-judicial settlements (originating in the blood feud) to pacify the parties to a criminal offence. There were, moreover, wide differences in crime rates between different areas, depending partly on the individual costs of, and community pressures against, reporting offences, and partly on the institutional remedies available. Lenman and Parker also suggest that the composition system was part of the tradition of 'community law' which, in Durkheim's terms, exalted restitutory justice, and which developed from the laws of the German tribes who invaded the Roman Empire, while 'State law' emphasized punitive justice and was 'rooted, at least in part, in the legal system of the Empire and its Byzantine successor'.[62] Between the tenth and the nineteenth centuries, State law gradually displaced community law throughout Europe, very early in England, later on the Continent, with the reception of Roman Law. Thus, in Anglo-Saxon England, 'local customary legal systems emphasized the settling of disputes through reconciliation rather than through punishment',[63] a pattern that was reversed as, from the time of Henry II onwards, the 'common law' of the State replaced the legal systems of local feudal authorities, and offences previously treated as civil wrongs were redefined as assaults on the public authority of the State.[64] There seems often (as in seventeenth-century France) to have been a significant difference in the clientele and social functions of the two systems: compensation to resolve conflicts between social equals and communal neighbours, summary State justice for the control of the poor.

With the encroachment of State law, a number of interrelated changes occurred. As the criminal law shifted from the private to the public domain, the range of actions subject to criminal sanctions expanded, stretching to include prohibitions which 'had no basis in customary law and, in many instances, were opposed to long-standing traditions'.[65] The State's developing monopoly of legitimate violence

increasingly undermined the threat of the blood feud and other forms of private violence, on which local settlement of wrongs through restitution ultimately depended,[66] and thus contributed to an expansion of the role of the punitive State courts. With the professionalization of judicial administration, prosecutions became easier and convictions more likely. Above all, in the Age of Revolution, the criminal court became more punitive, the duties of the more numerous law enforcement agents more wide-ranging, and 'the State's control over the everyday life of its subjects, through its machinery of law, grew ever closer'. In short, 'the model of European criminal law and its evolution constructed by Durkheim will have to be abandoned'.[67]

Industrial Societies. As for the picture in 'advanced' or industrial societies, Durkheim's thesis of declining repressive in the face of restitutory law has been no less subject to criticism. Thus Lenman and Parker point to the new concern with reformation in the nineteenth century:

> The penitentiary system of the nineteenth century was . . . significantly different from the secular restitutive justice of early modern society. Instead of readjusting social relationships, if necessary, by financial compensation, and showing little interest in the personalities involved, the penitentiary sought to reconstruct personalities. Furthermore, the norms for reconstruction were laid down by the State. Early modern ecclesiastical tribunals applied Christian norms in a similar way, but even they had looked for a public reconciliation between parties or individual wrong-doers and the community they lived in; the modern State with its monopoly of criminal processes is at once impersonal and, in theory, infinitely demanding.[68]

More generally, Durkheim seems sytematically to have understated the repressive aspects of modern law, and in a number of ways. First, there is the punitive dimension of civil law: for not only the criminal but all legal provisions are backed by the enforcement apparatus of the State (as in contempt of court) employing a system of penalties. Often, indeed, the sanctions of the civil law are highly punitive and can be more so than those of the criminal law, and in various ways that are worthy of further investigation.[69]

Second, however, there is the nature of the modern criminal law itself, and notably its tendency to expand its range of application into new areas – such as weights and measures, criminal trespass and, most recently in Britain, trade union legislation – and sometimes for progressive and humanitarian reasons, as with environmental and consumer protection legislation. Sometimes (and this contradicts a further aspect of Durkheim's argument) it does so by stressing vicarious liability and thus collective, and not individual, responsibility. In non-liberal States, of course, such expansion has often embraced individual, private life and the economic sphere, where according to Durkheim organic solidarity should reign: consider the South African pass laws and Communist States' penalties for economic crimes. Furthermore, as students of deviance, and above all the so-called labelling theorists have stressed, the nature and depth of 'repression' in both civil and criminal law is greater and more complex than may appear on the surface, involving stigmatization and the exclusion of alien elements in a process that can itself be understood in a quasi-Durkheimian manner as a way of reaffirming the collective identity of the in-group.[70]

There is, of course, much more to say on all these matters, but enough perhaps has been said to indicate how one writer can have come to the dramatic conclusion that, as against Durkheim's evolutionary hypothesis of repression giving way to restitution, 'a strong argument could be made for the contrary proposition that the development of law has been from a basically restitutive model to a repressive model'.[71]

The reader will doubtless come to his own conclusions as regards Durkheim's particular evolutionary hypotheses concerning the law on suicide and the development of punishment, property and contract. They are all to some degree independent of the master hypothesis just considered, and of the criticisms of it that we have outlined. Suffice it here to indicate one study bearing on Durkheim's account of penal evolution. According to this, punishment in general has grown less severe as societies advance in concentration and complexity, though this tendency is counteracted by the independent, contingent and transitory effects of political

authoritarianism; and, as collective religiosity declines and individualism progresses, the deprivation of liberty, in the form of incarceration, increasingly becomes the normal mode of social control. Surveying data from some 48 societies, Spitzer has argued, on the contrary, that

> (1) The severity of punishment does not decrease as societies grow more concentrated and complex. On the contrary, greater punitiveness is associated with higher levels of structural differentiation. (2) While variations in political structure are related to punitive intensity, these variations are neither historically contingent, nor idiosyncratic. (3) Although the 'religiosity' of deviance is correlated with punitiveness, collective crimes are more common in complex than simple societies. (4) Controls involving social and geographic segregation are not represented by incarceration alone and are not peculiar to advanced societies [e.g., banishment and punitive slavery].[72]

On the other hand, one can say that here, as in the thesis of evolution from repression to restitution, a series of macro-connections is boldly postulated, whose refinement, and indeed refutation, can represent a significant advance in the sociological understanding of law. As is the case elsewhere in Durkheim's work, empirical truth, or even plausibility, is not necessarily the most relevant test of his theories' fruitfulness.

Crime and punishment

We turn finally to the assessment of Durkheim's theory of crime and punishment, and in particular his idea that crime 'is a factor in public health, an integrative element in any healthy society' and indeed 'indispensable to the normal evolution of morality and law'.[73] Here we will confine ourselves to discussing Tarde's wide-ranging critique and Durkheim's response, reproduced in chapter 3.[74]

Tarde perceptively noted that, according to Durkheim's thesis, it is not strictly crime, but the coupling of crime and punishment that is healthy and socially normal, a point which Durkheim explicitly accepts. In effect, Durkheim's thesis is a complex one, embodying three distinct claims. The first, which we may call the *functional to integration claim*, is that

crime and punishment are *both* functional to social integration in so far as crime elicits punishment which in turn (as the passage from *The Division of Labour* explicates) reafirms and reinforces collective beliefs and sentiments and, thus, social solidarity. The second claim, which we may label the *counterfactual claim*, asserts that a certain level of crime is normal and a crime-free society impossible since, if (counterfactually) all existing crime disappeared, society would re-invent it – that is, new crimes would appear, for the very reason that the common conscience would 'denounce more severely acts which it previously would have judged more leniently: and that, in consequence, criminality, having disappeared under one form, would reappear under another'.[75] The third claim, which we may call the *functional to change claim*, asserts that crime (although not in this case punishment) has a utility, generally indirect, but sometimes direct, in bringing about moral change: indirect, as an index, so to speak, of social flexibility, 'because crime could only cease to exist if the *conscience collective* dominated individual consciences with such an ineluctable authority that all moral change would be rendered impossible; direct, in that occasionally, *but only occasionally*, the criminal has been the harbinger of a morality to come'.[76] In this debate here with Durkheim, Tarde takes on only the second and third of these claims, and he also attacks the evidence on which Durkheim relies and some of the underlying assumptions of his argument.

Against the counterfactual claim, Tarde simply denies that the abolition of crime would lead to greater punitive severity, particularly towards currently venial faults, arguing, on the contrary, first that a decline in crime would lead to less severity, especially towards venial faults, and secondly that increased public severity results rather from crime waves. Behind this disagreement, of course, lies a deeper difference with Durkheim as to the sources of crime. Durkheim stresses (in a very modern way) the social construction of deviance by the defining of certain acts as criminal. Tarde is content to suggest that 'a radical and energetic reform of our judicial and prison system[77] would be sufficient to eradicate crime; Durkheim by contrast points to (some of) the ways in which society creates crime. There is, needless to say, much more that can

be said about this counterfactual argument, its presuppositions and plausibility. In particular, the question remains: why did Durkheim suppose that in the absence of crime, society would always recreate it? The answer presumably lies in two underlying assumptions: that all social orders involve the institution and enforcement of collective norms (with corresponding sanctions)[78]; and that no society could ever attain that degree of social homogeneity that would preclude their violation.

As for the functional to change claim, Tarde partly misconstrues what Durkheim wrote in the *Rules*, as Durkheim indicates in his reply. He, Durkheim, did not say that there is any psychological affinity between crime and genius, and so Tarde's comments about the different causes of crime and genius and the different social backgrounds from which they allegedly stem are quite beside the point, or at any rate Durkheim's point. More pertinent is Tarde's claim that there is no connection between the violations of laws which constitute crimes and the sources of moral invention, such that eradicating the former would dry up the latter, and also, Tarde's further speculative suggestion that such eradication might open up unforseen possibilities of moral development. Here Durkheim's response is simply to reiterate his claim that crime is to be seen as an index of social diversity and flexibility, that moral reformers are by their very nature criminals, and that, viewed more widely still, morality itself, including law, must adjust to the exigencies of social expediency. But this does not really deal with Tarde's denial of a connection; that challenge could only be met by a more precise and detailed exploration of the linkages proposed. Nor, incidentally, does Durkheim sustain the claim of the indirect functionality of crime to moral change: the most his argument as stated suggests is that the presence of crime is an indicator of the existence of other factors that in turn allegedly facilitate moral change.

In addition, Tarde (inconsistently) offers both statistical evidence against the thesis that the contemporary rise in crime was normal (which Durkheim did not assert), and an argument against the reliability of such statistics in the first place. He also makes two telling and general criticisms of

Durkheim's presuppositions. First, he questions the soundness of Durkheim's distinction between the normal and the pathological, suggesting (controversially) that such a distinction requires a teleological assumption, such as the goal of adaptation, and arguing (persuasively) that Durkheim, in linking normality by definition to a society's 'conditions of existence', smuggles in some normative assumptions of his own. How else can one account for his claim that the contemporary rise of religion and the growth of anomie were *abnormal*?[79] Second, Tarde, rather rhetorically, questions Durkheim's claims for science, arguing, like Max Weber, that science cannot prescribe values that guide the will: its role is, rather, negative, showing the limits of the possible and 'the unrealizable and contradictory character of many of our desires', – which are 'given preferences', generated outside science.[80] To neither of these more deep-lying criticisms does Durkheim here offer any real answer.

Durkheim's theory of crime and punishment is, then, a somewhat complex affair, open to telling criticisms at a number of points, not all of which are destructive and some of which are a challenge to further specification and elaboration. As for the first, *functional to integration claim*, which Tarde did not address, though briefly stated by Durkheim, it is a venerable idea, or rather set of ideas, first found in Plato, that retains its appeal, among lawyers, social scientists and moral conservatives of all kinds.[81] For an admirable discussion, which distinguishes between its sociological version (as found in Durkheim) and its conservative version (as found in Plato), the reader is referred to H. L. A. Hart's article, 'Social solidarity and the enforcement of morals'.[82] The central difficulty in the sociological version lies in specifying objectively just which practices, relations and institutions constitute 'society' and, in consequence, just what constitutes the 'social disintegration' that would, *ex hypothesi*, attend the non-punishment (to what extent?) of criminal offences (which? and committed by whom?). If these matters are not specified, the sociological thesis rapidly collapses into the conservative thesis, according to which any favoured set of social practices, relations and institutions may be defended and any set of activities punished, on the argument that allowing them

to go unpunished would lead to 'social disintegration', though of course, even the latter thesis must make empirical assumptions about the consequences of punishment and non-punishment.

Finally, the attentive reader will have noted that there appears to be some conflict between Durkheim's claim that punishment, in the form of penal or repressive law, is supposed to decline with industrialization and the progress of societies, and his claim that some level of crime and punishment is normal for every society. To this problem there are two answers (which in turn only raise further questions). First, he did not suppose that punishment could decline to vanishing point, but rather that it would become less severe and change its character in the face of modern social conditions and, above all, the modern 'religion of individualism'. Second, in any case, his views about the role of collective beliefs and sentiments and their relation to social solidarity changed after writing *The Division of Labour*. In that work, though in a rather confused way, he suggested that 'organic solidarity' and the morality associated with it, might take on a cooperative, reciprocal, restitutory form – one that could not require penal enforcement. In his later writings, however, especially after 1895, he came to think that the modern morality of individualism and distributive justice involves not the abandonment but the transformation of collective beliefs and sentiments, whose need for penal expression and reinforcement survives. As he put it in 'Individualism and the Intellectuals', 'the religion of the individual can . . . allow itself to be flouted without resistance, on penalty of ruining its credit; since it is the sole link which binds us one to another, such a weakening cannot take place without the onset of social dissolution'.[83]

THE RELEVANCE OF DURKHEIM'S SOCIOLOGY OF LAW

The central place occupied by the study of law in the Durkheimian corpus makes a consideration of his work on the subject mandatory for those seeking to understand the nature of his contribution to sociology. Beyond its obvious

importance for any attempt to assess Durkheim's own distinctive vision of the field one must, however, ask what, if anything, his work on law has lastingly contributed to the field, in the light of current sociological research and approaches. Necessarily the answer to this question must be qualified, for Durkheim's treatment of a subject so close to the core of his sociological concerns shares all the defects and limitations implicit in his whole theoretical approach. Conversely, it also embodies the very features that have rescued his work from the dustbin of history and made it a continuing source of inspiration and theoretical stimulation.

Some of Durkheim's more uncritical admirers have sought to find in his work on law anticipations and adumbrations of more recent work in the field.[84] His insistence on viewing crime as a social phenomenon has been praised as the foundation of a 'fully social theory' of deviance.[85] His ironic view of crime as 'a factor in public health, an integrative element in any healthy society';[86] his insistence upon the symbiotic relationship of crime and punishment; and his assertion that 'what confers upon [deviations] this character is not the intrinsic importance of the acts but the importance which the collective consciousness ascribes to them';[87] have together been seen as foreshadowing the central insights of labelling or societal reaction theory.[88] Finally, given the recent revival of concern with developing a historically informed sociology of social control, and more especially with the interrelationships of punishment and social structure, there have been efforts to draw attention to Durkheim's pioneering work on the subject, for his 'status as one of the "classical" sociology theorists, and the detailed and extended nature of his treatment of penal law . . . tend to constitute these texts as a respectable repository of conceptual tools with which to organize and "make sense of" the mass of empirical data produced by penological research'.[89]

All such claims distort and exaggerate the value of Durkheim's contributions. Consider, for example, the alleged affinity of his ideas with those of societal reaction theory. Early on in his career, Durkheim saw crime in essentially conventional, negative terms; he sought to distinguish 'the differentiation . . . which disintegrates (cancerous, microbic,

criminal) . . . from that which concentrates vital forces (division of labour)'[90] and saw the criminal as someone who seeks 'to live at the expense of ' society,[91] and crime itself as 'the very negation of solidarity'.[92] His subsequent abandonment of this stance and inversion of 'common sense' (crime, he now claimed, was 'linked to the basic conditions of social life', and played 'a useful part' in the 'normal evolution of morality and law'[93]) does mark a welcome move away from the purely 'correctional' viewpoint that continues to dominate criminology till at least the mid-twentieth century. Yet, he remains remote from the 'appreciative naturalism' which David Matza[94] sees as one of labelling theory's major contributions to the study of deviance.

Some of Durkheim's ideas *can* be shown to have had a quite direct influence on labelling theory. Kai Erikson's *Wayward Puritans*[95] borrows, in a wholly uncritical way, a number of Durkheimian notions – the conception of punishment as a symbolic reaffirmation of the community's moral values and beliefs, the idea that a certain level of crime is 'normal' for a given society, and the realization that deviance is a social creation: 'We should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it.'[96] Erikson's work, while embedded in a functionalism generally foreign to the societal reaction literature, nevertheless became a central point of reference for those working within that tradition, not least because it appeared to demonstrate the socially contingent nature of deviant labels, and the crucial role of audience reactions in the manufacture of deviance and the constitution of deviant identity.[97]

It would be a mistake, however, to see any very close affinity between Durkheim's views and those of the societal reaction theorists. The primary inspiration for the latter was the distinctively American tradition of the Chicago School.[98] While Durkheim does, indeed, argue that criminality is not an inherent quality of a particular class of actions, but rather the outcome of a process of social definition, he also insists on the existence and importance of a set of universally accepted moral rules, which are absolute, clear and obvious to all members of

a society in all situations – a proposition which, if accepted, renders the central concerns of the societal reaction theorists moot. In Durkheim's case, then, the claim that the nature of crime (and, by extension, the nature of other forms of deviance) does not lie in 'the intrinsic importance of the acts'[99] did not and could not lead to an exploration of the practical uses of social rules or of the processes by which some rule violators and not others come to be defined as deviant. His most basic theoretical premises led him 'to assume that the major social norms generally express the sentiments of the total society. He never seriously entertained the idea that they might only express the sentiments of a specific stratum within it.'[100] The idea that moral meanings are to a high degree uncertain and variable, that they are not uniformly distributed through the social structure, indeed that it may not be possible to specify major social norms about which there is general agreement (all central assumptions of most recent work on deviance) were notions radically incompatible with the Durkheimian vision of the ways in which societies are held together.

On the contrary, Durkheim was disposed to argue that 'the only feature common to all crimes is that . . . they comprise acts universally condemned by the members of each society'.[101] So, far from prompting concern with the existence of conflicting or ambiguous moral evaluations, and hence with the crucial roles played by power and 'respectability' in the application of deviant labels, it was Durkheim's view that 'crime disturbs those feelings which, in any single type of society, are to be found in every healthy conscience'.[102] Evidence that moral rules do not generally command such universal acceptance was rendered innocuous by claiming such situations were pathological and atypical (the product, for example, of the forced division of labour), or by the assertion that 'ignorance or insubordination [to the fundamental rules of society] are irrefutably symptoms of a pathological perversion'.[103] Hence, Durkheim's work has proved of only limited value to modern theorists, concerned to emphasize the basically problematic nature of deviance, particularly in modern, highly differentiated societies.

One may go further: Durkheim's central methodological

presuppositions are such that, as long as one adheres to them, sustained attention to subjective meanings and actors' conceptions of reality as constitutive of the social order, is simply impossible. Notwithstanding his increasing concern with 'collective representations' and the cultural or ideational dimension of social reality,[104] Durkheim remains committed to a vision of sociology within which knowledge is built up on the basis of hard data – 'social facts' that in principle are supposedly identifiable wholly without reference to subjective or inter-subjective meanings, and whose interrelationships are then subjected to causal analysis. From within such a rigid, absolute conception of a social reality, the essentially *meaningful* character of social interaction is systematically obscured.[105]

It was, of course, precisely this methodological viewpoint that led Durkheim to study law in the first place. Vital to his project of 'treating social facts as things', to be discovered through empirical investigation, was the use of indicators to allow 'external' observation of aspects of the social world otherwise inaccessible to scientific observation and measurement. Such indices were for him the key to understanding characteristics of social life which though 'less apparent are doubtless more essential'.[106] Thus, 'social solidarity is a wholly moral phenomenon which by itself, does not lend itself to exact observation and especially not to measurement'.[107] Fortunately, however, a solution is at hand: 'We must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter. That visible symbol is the law.'[108] Law 'is nothing more than the most stable and precise element in this very organization . . . . Thus we may be sure to find reflected in the law all the essential varieties of social solidarity.'[109]

For law to fulfill the role Durkheim had assigned it, it was essential that it 'exist permanently . . . and constitute a fixed object, a constant standard which is always at hand for the observer, and which leaves no room for subjective impressions or personal observations'.[110] Inescapably, therefore, he was driven to treat law as a set of given standards by which behaviour is judged, and to assert that this judgment is inherently non-problematic. Only by adopting this viewpoint

could he plausibly claim to bypass actors' conceptions of social reality, and to rest his analysis upon externally defined brute facts, grasped purely objectively. Within a few years of Durkheim's death, Bayet subjected the assumption that law could be analysed in this artificial way to withering criticism:

> I know well that law has the advantage of being an easily gotten social fact. Morality seems to be rolled up in it for the greatest convenience of sociologists and it is the real morality of actions, since it provides for sanctions. But from the first, it remains to be known if these sanctions are applied: the existence of a law is a fact, but the application of the law is also a fact . . . . Moreover . . . the law registers morality only in simplifying it. All that is nuance or diversity falls out.[111]

Recent studies of the day-to-day administration of the legal system and of the ways in which the personnel mediating this process modify and distort the formal provisions of the law, have lent empirical substance to these objections,[112] and one must conclude that only the radical rejection of Durkheim's views on the subject opened up this domain of sociological inquiry.

Similarly, and perhaps even more strikingly, those engaged in developing a historical sociology of punishment have largely ignored Durkheim's pioneering work on the subject. The major reason for this neglect is almost certainly Durkheim's own extraordinary neglect of the phenomenon of power, and the generally underdeveloped nature of his political sociology. Recent work has rightly seen systems of punishment as inextricably linked with the asymmetric relationships of control and dependency characteristic of the larger society, and has stressed their connections with the changing forms and extent of state power and economic organization.[113] Law, after all, is one of the focal points of conflict and struggle in modern societies, a major means by which power is legitimized, and the form in which coercion is most routinely exercised. Durkheim's insistence on viewing law and its associated penal systems as straightforward expressions of a unitary *conscience collective* effectively precludes any serious attempt to grapple with these issues.[114]

His one gesture at incorporating political variables into his

analysis: the claim in 'Two Laws of Penal Evolution' that absolutist forms of government operate to intensify the severity of punishment independently of a society's level of social development, certainly provides no basis for a more extended Durkheimian treatment of state forms and their relation to law. In his eagerness to claim that absolutism exercises a wholly independent influence upon the intensity of punishment, Durkheim makes the extraordinary claim that this (and by implication any other) form of political organization is not 'a consequence of the fundamental nature of society, but rather depends on unique, transitory and contingent factors'.[115] Almost uniquely among social phenomena, therefore, much of the political realm is portrayed as lying outside what Durkheim otherwise insists in the all-pervasive influence of *la Société*. He is at least consistent on this point: the analysis of political phenomena was excluded from discussion in the *Année socioligique* on the grounds of their contingency and unpredictability. Consistency in this instance is, however, scarcely a virtue.

One can only conclude that in appealing to what for him was the residual category of the organization of State power (which he contends is in any event of only secondary causal importance), Durkheim is inventing an illegitimate *deus ex machina* designed to explain away facts which otherwise all too visibly contradict his first 'law' of penal evolution. Such special pleading is, as we have noted, his characteristic way of dealing with awkward evidence. Here, however, it involves him in a further confusion. In general, Durkheim insists that positive law is no more than an index or expression of 'social life', and that the state and the lawmakers function as neutral transmitters of general social values: the authorized 'interpreters of . . . collective sentiments'.[116] But in the case of absolutism, at least, he allows that the constitution and structure of state power decisively affects the content of the law, and thus that 'the State *is* more than a cypher without effects'.[117] Quite reasonably, recent researchers have declined to put on this Durkheimian straitjacket, and have instead sought to explore the impact of a variety of political structures and processes on the constitution and administration of the penal law.

Current sociological analyses of systems of punishment have

also rejected Durkheim's insistence on viewing penality as essentially reducible to retribution. Rather than concentrating 'the study of the punitive mechanisms on their "repressive" effects alone', most modern work has endorsed Foucault's injunction to 'regard punishment as a complex social function'.[118] The consequence has been to make available for analysis a whole spectrum of phenomena that Durkheim's essentialist definition would have artificially insulated from scrutiny: attempts to reform and rehabilitate, to prevent and to deter, and their associated 'discourses, rhetorics, and techniques'. As Garland insists: 'the purpose of theory must be to open up such complexities to analysis and significance – not to banish them by the decree of an imperious Essence'.[119]

If Durkheim's insistence on reducing punishment to its retributive elements has met with general scepticism, his associated analysis of the symbolic aspects of punishment has had a barely-acknowledged, yet pervasive, impact on later work in the field. Foucault, who is loftily dismissive of the value of Durkheim's work,[120] develops a semiology of punishment which unquestionably owes much to Durkheim's earlier exploration of related themes – the drawn out ritual destruction of the body of the regicide, Damiens, contrasted with the minutely proportioned, rule-governed confinement of the anonymous individual offender in the nineteenth-century penitentiary: punishment as spectacle or as the most hidden part of the penal process. Linebaugh's discussion of the rituals attending public executions at Tyburn Tree has obvious Durkheimian overtones.[121] Douglas Hay's analysis of the majesty, the ritualistic pomp and circumstance of the administration of eighteenth-century English criminal law, with its emphasis on the contributions such symbolism and ritual made to the ideological integration of English society, likewise owes much to Durkheim, as well as to the more obvious inspiration of Marx.[122]

As always, however, what has been borrowed from Durkheim are particular insights and suggestive hypotheses extracted from a theoretical matrix which, as a totality, no longer carries conviction. In discussing the ideological functions of the criminal law, Hay is explicit about its role as a weapon in the struggle of a patrician ruling class to maintain

its hegemony, a means of *producing* political sentiments and loyalties rather than an occasion for expressing and thereby reinforcing them. In delimiting the shift from penalties visited upon the body to those involving confinement and the temporary suspension of rights, Foucault is explicitly *not* endorsing a Durkheimian vision of the progressive humanization of punishment: 'not to punish less, but to punish better; to punish with an attenuated severity, perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body'.[123]

Current research may continue to endorse the value of Durkheim's insistence on studying law in its social and historical context, and on the need to tease out the connections between law and the forms of social relations. Such research may also reiterate his emphasis on the central importance of law to the understanding of social life in general; his recognition that punishment is more than simply a negative corollary of crime which must be analysed, in fact, as a positive and productive social phenomenon; and his injunction that legal institutions, like other social institutions, must be accounted for, not just in functional terms, but with reference to their material conditions of possibility.[124] It does so, however, only while rejecting the larger theoretical system within which these propositions were once embedded.

NOTES

1 *The Division of Labour,* this vol. p. 33.
2 *Ibid.*, p. 38.
3 *Ibid.*, p. 69.
4 Compare with Durkheim's applied educational sociology, especially his discussion of discipline and the use of punishment in schools, in his *Moral Education: A Study in the Theory and Application of the Sociology of Education*, translated by E. K. Wilson and H. Schnurer and edited E. K. Wilson (Free Press, New York, 1961).
5 'Note sur les systèmes juridiques' by Durkheim and P. Fauconnet, *Année sociologique*, VI, (1903), p. 305.
6 *Ibid.*
7 See chapter 5.
8 See chapter 4.
9 See chapters 7 and 8.

10 In the Preface to the second volume of the *Année sociologique*, Durkheim wrote: 'Religion contains in itself from the very beginning, even in an indistinct state, all the elements which in dissociating themselves from it, articulating themselves, and combining with one another in a thousand ways, have given rise to the various manifestations of collective life. From myths and legends have issued forth science and poetry; from religious ornamentations and cult ceremonials have come the plastic arts; from ritual practice were born law and morals.' *Année sociologique*, II (1899), pp. iv–v.
11 *Revue de l'histoire des religions*, **34**, pp. 269–95 and **35**, pp. 31–60, reprinted in M. Mauss, *Oeuvres*, ed. V. Karady (Paris, Editions de Minuit, 1969), Vol. 2, pp. 651–98. Mauss here expanded Durkheim's basic thought that 'it is certain that penal law was essentially religious in origin' this vol., p. 64.
12 P. Fauconnet, *La Responsabilité: étude sociologique* (Paris: Alcan, 1920).
13 G. Davy, *La Foi jurée: étude sociologique du problème du contrat* (Paris, Alcan, 1922).
14 P. Huvelin, 'Magie et droit individuel', *Année sociologique*, **10** (1907), pp. 1–47.
15 E. Lévy, *Responsabilité et contrat* (Paris, Librairie Cotillon, 1899).
16 See ch. 3 below. See also S. Lukes, *Emile Durkheim: His Life and Work: A Historical and Critical Study* (London, Allen Lane, 1973), ch. 16.
17 'La sociologie en France au XIXe siècle', *Revue bleue*, **13** (1900) p. 648.
18 See Durkheim and Fauconnet's note on 'Systèmes juridiques' (footnote 5) and Durkheim's *The Rules of Sociological Method* trans. W. D. Halls and edited with intro by S. Lukes (London, Macmillan, 1982), ch. 1.
19 See W. Paul Vogt, 'Obligation and right: The Durkheimians and the sociology of law' in P. Besnard (ed.) *The Sociological Domain: The Durkheimians and the Founding of French Sociology* (Cambridge, Cambridge University Press and Paris, Editions de la Maison des Sciences de l'Homme, 1983). Vogt notes that a number of the Durkheimians pursued their studies in faculties of law, nearly a quarter of them had formal training in a law faculty and that, with the passing of the *Année*, six contributed to a new journal, founded in 1931, the *Archives de philosophie de droit et de sociologie juridique*.
20 H. L. A. Hart, 'Are there any natural rights?' *Philosophical Review*, **64** (1955), reprinted in R. E. Flathman (ed.), *Concepts in Social and Political Philosophy* (New York: Macmillan, 1973), p. 442.
21 *De la Division du travail social* (1st edn Paris, 1893), pp. 22–24.
22 *The Division of Labour*, this vol., p. 33.
23 Vogt, *art. cit.*, p. 180.
24 See Lukes, *Emile Durkheim*, pp. 12–14.
25 *The Rules of Sociological Method* (1982 edn), p. 143.
26 Vogt, *art. cit.*, p. 183.
27 Durkheim, *Professional Ethics and Civic Morals*, trans. C. Brookfield (London, Routledge & Kegan Paul, 1957), p. 50.

28 Max Weber, *Economy and Society*, G. Roth and C. Wittich (eds) (Berkeley and London, University of California Press, 1978) Vol. 1, Part 2, ch. 1, and Vol. 2, ch. 8.
29 *The Division of Labour*, this vol., p. 34.
30 *Ibid.*, p. 35.
31 *Ibid.*, p. 34.
32 R. Needham, Introduction to E. Durkheim, *Primitive Classification* (London, Cohen and West, Chicago, University of Chicago Press, 1963), p. xv.
33 Vogt, *art. cit.*, p. 184
34 Durkheim, 'Individualism and the intellectuals', trans. S. and J. Lukes, *Political Studies*, **17** (1969), p. 27.
35 *The Rules of Sociological Method*, p. 35.
36 H. L. A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961) chs v and vi.
37 *The Division of Labour*, Book III, ch. 1, section III.
38 *Max Weber on Law in Economy and Society*, M. Rheinstein (ed., (Cambridge, Mass., Harvard University Press, 1966), *passim*, especially pp. 201 ff.
39 *Ibid.*, p. 202 For discussions of this, see A. Hunt, *The Sociological Movement in Law* (Philadelphia, Temple University Press, 1978), pp. 122–8; D. Trubeck, 'Max Weber on law and the rise of capitalism', *Wisconsin Law Review*, **3** (1972), pp. 720–53.
40 Durkheim, *Professional Ethics*, p. 48.
41 *The Division of Labour*, this vol., p. 45.
42 *Ibid.*
43 D. Garland, 'Durkheim's theory of punishment: a critique', to appear in D. Garland and P. Young (eds) *The Power to Punish* (London: Heinemann, 1983).
44 H. Lévy-Bruhl, *Sociologie du droit* (Paris, Presses Universitaires de France, 1961), p. 113. cited in Vogt, *art. cit.*, p. 185.
45 Vogt, *art. cit.*, p. 185.
46 This table is taken from Lukes, *Emile Durkheim*, p. 158.
47 Hunt, *Sociological Movement in Law*, pp. 72–3.
48 Michael Clarke, 'Durkheim's sociology of law', *British Journal of Law and Society*, **3** (1976), p. 249.
49 *De la division du travail social* (Paris, Presses Universitaires de France, 1973, 9th edn) p. 108.
50 B. Malinowski, *Argonauts of the Western Pacific* (London, 1922).
51 B. Malinowski, *Crime and Custom in Savage Society* (Totowa, N. J., Littlefield Adams, 1966), p. 51, cited in S. Sheleff, 'From restitutive law to repressive law: Durkheim's *The Division of Labour in Society* revisited', *Archives européennes de sociologie (European Journal of Sociology)*, XVI (1975), p. 29.
52 *Ibid.*, p. 55.
53 E. A. Hoebel, *The Law of Primitive Man* (Cambridge, Mass., Harvard University Press, 1954); M. Gluckman, *The Judicial Process among the*

Barotse of Northern Rhodesia (Glencoe, The Free Press, 1955); P. Bohannan, *Justice and Judgment among the Tiv* (London: Oxford University Press, 1957).

54 R. D. Schwartz and J. C. Miller, 'Legal evolution and societal complexity', *American Journal of Sociology*, LXX (1964), p. 166. But for criticism of the relevance of Schwartz and Miller's indicators to Durkheim's thesis, see R. B. M. Cotterrell, 'Durkheim on legal development and social solidarity', *British Journal of Law and Society*, **4** (1977), pp. 266–8.

55 J. A. Barnes, 'Durkheim's *Division of Labour in Society*', *Man*, **1** (1966), pp. 168–9. DuBow likewise concludes that 'when the law of simple local communities is compared with the law of the more complex state systems of which they become a part, the direction of legal change is from an emphasis on restitution to a greater reliance on repressive criminal law'. F. DuBow, 'Nation building and the imposition of criminal law', unpublished paper presented to the Annual Meeting of the American Sociological Association, Montreal, Canada, Aug. 1974, p. 8.

56 Barnes, *art. cit.*, pp. 168–9.

57 *De la division du travail social* (9th edn), p. 110.

58 See Sheleff, *art. cit.*, (footnote 51). Sheleff cites the work of Julius Wellhausen, Yehezkel Kaufman and A. S. Diamond.

59 H. S. Maine, *Ancient Law* (10th) edn. London, John Murray, 1919), p. 328, cited in Sheleff, *art. cit.*, p. 21.

60 See A. S. Diamond, *Primitive Law Past and Present* (London, Methuen, 1971) and Sheleff, *art. cit.*

61 B. Lenman and G. Parker, 'The State, the community, and the criminal law in Early Modern Europe' in V. A. C. Gatrell, B. Lenman and G. Parker (eds) *Crime and the Law: The Social History of Crime in Western Europe since 1500* (London, Europa Publications, 1980).

62 *Ibid.*, p. 44.

63 DuBow, *art. cit.*, p. 9.

64 *Ibid.*, p. 2.

65 *Ibid.*, p. 3.

66 *Ibid.*, pp. 6–7.

67 Lenman and Parker, *art. cit.*, p. 15.

68 *Ibid.*, p. 44.

69 Sheleff, *art. cit.*, p. 35.

70 See Sheleff, *art. cit.*, and K. Thompson, *Emile Durkheim* (Chichester, Ellis Harwood and London, Tavistock, 1982), p. 90.

71 Sheleff, *art. cit.*, p. 20.

72 S. Spitzer, 'Punishment and social organization: a study of Durkheim's theory of penal evolution', *Law and Society Review*, **9** (1975), p. 631.

73 *The Rules of Sociological Method*, this vol., pp. 71, 74.

74 In fact, Tarde responds to Durkheim's reply in G. Tarde, *Études de psychologie sociale* (Paris, 1898), pp. 158–61.

75 Durkheim, 'Crime and social health', this vol., pp. 93–4.

76 *Ibid.*, p. 6.

77 Tarde, Criminality and social health', this vol., p. 85.
78 Cf. R. Dahrendorf, 'On the origins of social stratification', in P. Laslett and W. G. Runciman (eds) *Philosophy, Politics and Society, Second Series* (Oxford, Blackwell).
79 See Lukes, *Emile Durkheim*, pp. 28–30 and introduction to Durkheim *Rules of Sociological Method* (London, Macmillan, 1982).
80 Tarde, *art. cit.*, pp. 23, 24.
81 See, for example, the English Lawyer, Lord Devlin's *The Enforcement of Morals* (London, Oxford University Press; see also Sir Walter Moberly, *The Ethics of Punishment* (London, 1968), especially ch. 8.
82 H. L. A. Hart, 'Social solidarity and the enforcement of morals', *University of Chicago Law Review*, 55 (1968), pp. 1–13.
83 Durkheim, 'Individualism and the intellectuals', p. 27.
84 See especially T. Anthony Jones, 'Durkheim and deviance: opportunities lost and regained', *Social Forces*, (1981); and to a rather more limited extent, M. Traugott, introduction to *Emile Durkheim on Institutional Analysis* (Chicago, University of Chicago Press, 1978).
85 I. Taylor, P. Walton, J. Young, *The New Criminology* (London, Routledge & Kegan Paul, 1973), ch. 3.
86 *The Rules of Sociological Method*, this vol., p. 71.
87 *Ibid.*, p. 73.
88 Jones, *art. cit.*
89 Garland, *art. cit.* It should be noted that Garland proceeds 'to dispute the charms of the Durkheimian sociology of punishment', often with insight, though from within a dubious conception of 'theory' and 'criticism'.
90 *De la division du travail: social* (9th edn), p. 344. Footnote.
91 *Ibid.*, p. 344.
92 *Ibid.*, p. 343.
93 *The Rules of Sociological Method*, this vol., pp. 73, 74.
94 D. Matza, *Becoming Deviant*, (Englewood Cliffs, N. J., Prentice-Hall, 1969).
95 K. Erikson, *Wayward Puritans* (New York, John Wiley, 1966).
96 *The Division of Labour*, this vol., p. 48.
97 Erikson, incidentally, fails to resolve (indeed appears oblivious to) the problems inherent in the Durkheimian ideas he embraces. Perhaps significantly, there have been few attempts to emulate his work.
98 Matza, *Becoming Deviant*.
99 *The Rules of Sociological Method*, this vol., p. 73.
100 L. Coser, 'Durkheim's conservatism and its implications for his sociological theory', in K. H. Wolff, *Emile Durkheim*.
101 *The Division of Labour*, this vol., p. 42.
102 *Ibid.*, p. 42.
103 *Ibid.*, p. 43.
104 'Social life is a system of representations and mental states', letter about the psychological conception of society' in *The Rules of Sociological Method* (1982 edn) p. 253.

105 For further discussion of these issues, see Lukes, introduction to *The Rules of Sociological Method* (1982 edn).
106 *Ibid.*, p. 75.
107 *The Division of Labour*, this vol., p. 33.
108 *Ibid.*
109 *Ibid.*, p. 34.
110 *The Rules of Sociological Method* p. 82.
111 A. Bayet, *Le Suicide et la morale* (Paris, 1925), quoted in J. D. Douglas, *The Social Meanings of Suicide* (Princeton, N. J., Princeton University Press, 1967, p. 63).
112 See, for example, Jerome Skolnick, *Justice Without Trial* (New York, John Wiley, 1966); D. Sudnow, 'Normal crimes: some sociological features of a public defender's office', *Social Problems* (1966); A Cicourel, *The Social Organization of Juvenile Justice* (New York, John Wiley, 1967).
113 See, for example, D. Hay *et al.*, *Albion's Fatal Tree* (New York, Pantheon, 1975); E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, Pantheon, 1975); S. Spitzer and A. Scull, 'Social control in historical perspective: from private to public responses to crime', in D. Greenberg (ed.) *Corrections and Punishment* (Beverly Hills, California, Sage, 1977); M. Foucault, *Discipline and Punish: The Birth of the Prison* (London, Allen Lane and New York, Pantheon, 1977); M. Ignatieff, *A Just Measure of Pain: The Penitentiary and the Industrial Revolution* (New York, Pantheon, 1978); A. Scull and S. Cohen (eds) *Social Control and the Modern State: Historical and Comparative Essays* (Oxford, Martin Robertson, 1983).
114 As Garland puts it, we are assured 'that moral or juridical rules are "collective" and not merely "individual" – but of course the real problem remains: how representative are these "collective" entities? Again and again Durkheim ignores this problem and formulates the central opposition as being that between the social and the individual. Meanwhile, he simply assumes the unity of the former category.' Garland, *art. cit.*
115 'Two laws of penal evolution', see ch. 4 below.
116 *The Division of Labour*, this vol., p. 45.
117 Garland, *art. cit.*
118 Foucault, *Discipline and Punish*, p. 23. Foucault is explicitly critical of Durkheim on this point.
119 Garland, *art. cit.*
120 Foucault, *Discipline and Punish*, p. 23.
121 P. Linebaugh, 'The Tyburn riot against the surgeons', in D. Hay, *et al.*, *Albion's Fatal Tree.*
122 D. Hay, 'Property, authority and the criminal law', in D. Hay, *et al.*, *Albion's Fatal Tree.*
123 Foucault, *Discipline and Punish*, p. 82.
124 Hunt, *The Sociological Movement in Law* pp. 90–2; Garland, *art. cit.*

CHAPTER 1

Laws as an Index of Social Solidarity

We have not merely to investigate whether, in [advanced] societies, there exists a social solidarity arising from the division of labour. This is a self-evident truth, since in them the division of labour is highly developed, and it engenders solidarity. But above all we must determine the degree to which the solidarity it produces contributes generally to the integration of society. Only then shall we learn to what extent it is necessary, whether it is an essential factor in social cohesion, or whether, on the contrary, it is only an ancillary and secondary condition for it. To answer this question we must therefore compare this social bond to others, in order to measure what share in the total effect must be attributed to it. To do this it is indispensable to begin by classifying the different species of social solidarity.

However, social solidarity is a wholly moral phenomenon which by itself does not lend itself to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolizes it, and then study the former through the latter.

That visible symbol is the law. Indeed, where social solidarity exists, in spite of its non-material nature, it does not remain in a state of pure potentiality, but shows its presence through perceptible effects. Where it is strong it attracts men strongly to each other, ensures frequent contacts between them, and redoubles the opportunities available to them to enter into mutual relationships. Stating the position precisely,

Source: Durkheim, E. *De la Division du travail social*, (Paris: Presses Universitaires de France, 10th ed. 1978) pp. 27–34.

This translation, by W. D. Halls, will appear in *The Division of Labour in Society* (London, Macmillan, forthcoming, 1984)

at the point we have now reached it is not easy to say whether it is social solidarity which produces these phenomena or, on the contrary, whether it is the result of them. It is also a moot point whether men draw closer to one another because of its dynamic effects, or whether it is dynamic because men *have* come closer together. However, for the present we need not concern ourselves with elucidating this question. It is enough to state that these two orders of facts are linked, varying with each other simultaneously and moving in the same direction. The more closely knit the members of a society, the more they maintain various relationships either with one another or with the group collectively. For if they met together rarely, they would not be mutually dependent, except sporadically and somewhat weakly. Moreover, the sum of these relationships is necessarily proportioned to the sum of legal rules which determine them. In fact, social life, wherever it becomes lasting, inevitably tends to assume a definite form and become organized. Law is nothing more than the most stable and precise element in this very organization. Life in general within a society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus we may be sure to find reflected in the law all the essential varieties of social solidarity.

It may indeed be objected that social relationships can be forged without necessarily taking on a legal form. Some do exist where the degree of regulation does not attain such a level of consolidation and precision. This does not mean that they remain indeterminate; instead of being regulated by law they are merely regulated by custom. Thus law mirrors only a part of social life and consequently furnishes us with only incomplete data with which to resolve the problem. What is more, it is often the case that customs are out of step with the law. It is repeatedly said that customs temper the harshness of the law, correct the excesses that arise from its formal nature, and are occasionally inspired with a very different ethos. Might then customs display other kinds of social solidarity than those expressed in positive law?

But such a contradiction only occurs in wholly exceptional circumstances. For it to happen law must have ceased to correspond to the present state of society and yet, lacking any

reason for continuing to exist, is sustained through force of habit. In that event, the new relationships that are established in spite of it, will become organized, for they cannot subsist without an effort of consolidation. Yet, being at odds with the old law, which persists, and not succeeding in penetrating the legal domain proper, they do not rise beyond the level of custom. Thus opposition is sparked off. But this can only occur in rare, pathological cases, ones which cannot continue without danger. Normally customs are not opposed to law; on the contrary, they form the basis for it. It is true that sometimes nothing else is built upon this basis. There may exist social relationships governed only by that diffuse form of regulation arising from custom. But this is because they lack importance and continuity, naturally excepting those abnormal cases just mentioned. Thus if types of social solidarity exist which custom alone renders apparent, these are assuredly of a very secondary order. On the other hand law reproduces all those types which are essential, and it is about these alone that we require to know.

Should we go further and assert that social solidarity does not consist entirely in its visible manifestations; that these express it only partially and imperfectly; that beyond law and custom there exists an inner state from which solidarity derives; and that to know it in reality we must penetrate to the heart of it, and without any intermediary? But in science we can know causes only through the effects that they produce. In order to determine causes more precisely science selects only those results that are the most objective and that best lend themselves to quantification. Science studies heat through the variations in volume that changes in temperature cause in bodies, electricity through its physical and chemical effects, and force through movement. Why should social solidarity prove an exception?

Moreover, what remains of social solidarity once it is divested of its social forms? What imparts to it its specific characteristics is the nature of the group whose unity it ensures, and this is why it varies according to the types of society. It is not the same within the family as within political societies. We are not attached to our native land in the same way as the Roman was to his city or the German to his tribe.

But since such differences spring from social causes, we can only grasp them through the differences that the social effects of solidarity present to us. Thus, if we neglect these differences, all varieties become indistinguishable, and we can no longer perceive more than that which is common to all varieties, i.e., the general tendency to sociability, a tendency which is always and everywhere the same and is not linked to any particular social type. But this residual element is only an abstraction, for sociability *per se* cannot be met with anywhere. What exist and what are really alive are the special forms of solidarity – domestic, occupational, national, that of the past and that of today, etc. Each has its own special nature. Hence general features can in any case only furnish a very incomplete explanation of the phenomenon, since necessarily they allow to escape what is concrete and living about it.

Thus the study of solidarity lies within the domain of sociology. It is a social fact which can only be known thoroughly through its social effects. If so many moralists and psychologists have been able to deal with this question without following this method it is because they have avoided the difficulty. They have divested the phenomenon of everything that is more specifically social about it, retaining only the psychological embryo from which it develops. It is indeed certain that solidarity, whilst being pre-eminently a social fact, is dependent upon our individual organism. In order to exist it must be sustained by our physical and psychological constitution. Thus, at the bare minimum, we can content ourselves with studying it from this viewpoint. But in that case we shall perceive only that aspect of it which is the most indistinct and the least special. Precisely speaking, this is not even solidarity itself, but only what makes it possible.

Moreover, such an abstract study cannot yield very fruitful results. For, so long as it remains in the state of a mere predisposition of our psychological nature, solidarity is something too tenuous to be easily understood. It remains an intangible virtuality too elusive to observe. To take on a comprehensible form that we can grasp, social outcomes must provide an external interpretation. Moreover, even in such an indeterminate state, it depends on social conditions, which explain it and consequently it cannot be detached from them.

This is why a few sociological perspectives are not infrequently to be found among these purely psychological analyses. For example, some mention is made of the influence of the *gregarious state* on the formation of social feeling in general; or the main social relationships on which sociability depends most obviously are rapidly sketched out. Undoubtedly such additional considerations, introduced unsystematically as examples and randomly as they suggest themselves, are insufficient to cast much light on the social nature of solidarity. Yet at least they demonstrate that the sociological viewpoint must weigh even with the psychologists.

Thus our method is clearly traced out for us. Since law reproduces the main forms of social solidarity, we have only to classify the different types of law in order to be able to investigate which species of social solidarity correspond to them. It is already likely that one species of law exists which symbolizes the special solidarity engendered by the division of labour. Once we have done this, so as to judge what part the division of labour plays, it will be enough to compare the number of legal rules which give it expression to the total volume of law as a whole.

To undertake this study we cannot use the habitual distinctions made by jurisprudents. Conceived for the practice of law, from this angle they can be very convenient, but science cannot be satisfied with such empirical classifications and approximations. The most widespread classification is that which divides law into public and private law. Public law is held to regulate the relationships of the individual with the State, private law those of individuals with one another. Yet when we attempt to define the terms closely, the dividing line, which appeared at first sight to be so clear-cut, becomes blurred. All law is private, in the sense that always and everywhere individuals are concerned and are the agents. But, above all, all law is public, in the sense that it is a social function, and all individuals are, although in different respects, functionaries of society. The functions of marriage and parenthood, etc., are not spelt out or organized any differently from those of ministers and legislators. Not without reason did Roman law term guardianship a *munus publicum*. Moreover, what is the State? Where does it begin,

where does it end? How controversial is this question is well known. It is unscientific to base such a fundamental classification on such an obscure and inadequately analysed idea.

In order to proceed methodically, we must discover some characteristic which, whilst essential to juridical phenomena, is capable of varying as they vary. Now, every legal precept may be defined as a rule of behaviour to which sanctions apply. Moreover, it is clear that the sanctions change according to the degree of seriousness in which the precepts are held, the place they occupy in the public consciousness, and the role they play in society. Thus it is appropriate to classify legal rules according to the different sanctions which are attached to them.

These are of two kinds. The first consist essentially in suffering, or at least in some disadvantage imposed upon the perpetrator of a crime. Their purpose is to hurt him through his fortune, his honour, his life, his liberty, or to deprive him of some object whose possession he enjoys. These are said to be repressive sanctions, such as those laid down in the penal code. It is true that those which appertain to purely moral rules are of the same character. Yet such sanctions are administered in a diffuse way by everybody without distinction, whilst those of the penal code are applied only through the mediation of a well-defined body – they are organized. As for the other kind of sanctions, they do not necessarily imply any suffering on the part of the perpetrator, but consist merely in *restoring the previous state of affairs*, re-establishing relationships which have been disturbed from their normal form. This is done either by forcibly redressing the action impugned, restoring it to the type from which it has deviated, or by annulling it, i.e., depriving it of all social value. Thus legal rules must be divided into two main species, according to whether they relate to repressive, organized sanctions, or to ones that are purely restitutory. The first group covers all penal law; the second, civil law, commercial law, procedural law, administrative and constitutional law, when any penal rules which may be attached to them have been removed.

CHAPTER 2

From Repressive to Restitutory Law

I

The bond of social solidarity to which repressive law corresponds is one the breaking of which constitutes the crime. We use the term 'crime' to designate any act which, regardless of degree, provokes against the perpetrator the characteristic reaction known as punishment. To investigate the nature of this bond is therefore to ask what is the cause of the punishment, or more precisely, what the crime consists of in essence.

Assuredly crimes of different species exist. But it is no less certain that all these species of crime have something in common. This is proved by the reaction that they provoke from society: the fact that punishment, except for differences in degree, always and everywhere exists. The common nature of the effect reveals the common nature of the cause. Undoubtedly essential resemblances exist not only in all crimes provided for in the legislation of a single society, but in all crimes recognized as such and punished in different types of society. No matter how different these acts, termed crimes, may appear at first sight, they cannot fail to have some common basis. Universally they strike the moral conscience of nations in the same way and universally produce the same consequence. All are crimes, i.e., acts repressed by prescribed punishments. Now, the essential properties of a thing lie in those observed wherever it exists and which are peculiar to it. Thus if we wish to learn in what crime essentially consists, we

Source I: *De la Division du travail social*, (Paris: Presses Universitaires de France, 10th ed. 1978) pp. 35–45.

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must discern those traits identical in all the varieties of crime in different types of society. Not a single one of these types may be omitted. Legal conceptions in the lowest forms of society are as worthy of consideration as those of the highest forms. They are facts which prove no less instructive. To rule them out of court would be to run the risk of perceiving the essence of crime where it is not. It would be like the biologist whose definition of living phenomena would be very inexact if he had scorned to observe single-cell creatures. If he had looked at organisms alone – and particularly the higher organisms – he would have concluded wrongly that life consists essentially in the organization of cells.

The way to discover this permanent, general element is clearly not to go through all those acts which have been designated as crimes, at all times and in all places, in order to note the characteristics they present. For, despite what has been stated, if there are acts which have been universally regarded as criminal, these constitute a tiny minority. Thus such a way of proceeding would provide us only with a singularly distorted notion of the phenomenon, because it would apply only to exceptions.[1] The variations in repressive law at the same time prove that this unchanging character is not to be found in the intrinsic properties of acts imposed or prohibited by penal rules, because these display so great a diversity, but in the relationships they entertain with some condition outside themselves.

This relationship was believed to lie in the kind of antagonism existing between these acts and the larger interests of society. It has been claimed that penal rules have expressed for each type of society the basic conditions for collective life. Their authority thus sprang from necessity. Moreover, since such needs vary according to societies, one could in this way explain the variations in repressive law. We have already given our view on this point. Such a theory ascribes much too large a part to deliberate calculation and reflection in directing social evolution. There are a whole host of acts which have been, and still are, regarded as criminal, without in themselves being harmful to society. The fact of touching an object that is taboo, or an animal or man who is impure or consecrated, or of letting the sacred fire die out, of eating certain kinds of meat,

of not offering the traditional sacrifice on one's parents' grave, of not pronouncing the precise ritual formula, or of not celebrating certain feasts, etc. – how have any of these ever constituted a danger to society? Yet we know the prominent position occupied in the repressive law of a large number of peoples such a regulation of ritual, etiquette, ceremonial and religious practices. We need only open the Pentateuch to be convinced of it. Moreover, as these facts are found to be normal in certain social species, we cannot regard them as mere anomalies or pathological cases which we may legitimately dismiss.

Even where the criminal act is certainly harmful to society, the degree of damage it causes is far from being in regular proportion to the intensity of repression it incurs. In the penal law of most civilized peoples, murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganize a community much more seriously than the isolated case of homicide. Assuredly murder is always an evil, but nothing proves that it is the greatest evil. What does one human being less matter to society? Or one cell fewer in the organism? It is stated that public safety would be endangered in the future if the act remained unpunished. But if we compare the degree of danger, however real it may be, to the penalty, there is a striking disproportion. Lastly, the instances just cited show that an act can be disastrous for society without suffering the slightest repression. On any score, therefore, this definition of crime is inadequate.

Modifying the definition, can it be asserted that criminal acts are those which *seem* harmful to the society which represses them? Can we also say that penal rules express, not the conditions essential to social life, but those which *appear* to be so to the group observing the rules? Yet such an explanation explains nothing: it does not permit us to understand why, in so many cases, societies have mistakenly enforced practices which, in themselves were not even useful. In the end this alleged solution to the problem really amounts to a truism. If societies therefore force every individual to obey these rules it is plainly because, rightly or wrongly, they esteem this systematic obedience to be indispensable, insisting

upon it strongly. This comes down to our saying that societies deem the rules necessary because they deem them necessary! What we should be saying is why they judge them necessary. If the view held by societies was based upon the objective necessity for a penal regulatory system, or at least upon its utility, this would be an explanation. But this goes against the facts, so the entire problem remains unsolved.

However, the last theory is not without some foundation. It is right in seeking the conditions that constitute criminality in certain states of the individual. Indeed the only feature common to all crimes is that, saving some apparent exceptions to be examined later, they comprise acts universally condemned by the members of each society. Nowadays the question is raised as to whether such condemnation is rational and whether it would not be wiser to look upon crime as a mere sickness or an error. But we need not launch into such discussions, for we are seeking to determine what is or has been, not what should be. The real nature of the fact we have just established cannot be disputed, viz., that crime disturbs those feelings which in any single type of society are to be found in every healthy conscience.

We cannot determine in any other way the nature of these sentiments or define them in relation to their special purposes, for these purposes have varied infinitely, and can vary again.[2] Nowadays it is altruistic sentiments which manifest most markedly this characteristic. But at one time, not at all remote, religious or domestic sentiments, and a host of other traditional sentiments had precisely the same effect. Even now, despite what Garofalo says, a mere antipathy for others is by no means the only condition for bringing about such an effect. Even in a time of peace do we not feel as much aversion for the man who betrays his country as for the robber and swindler? In countries where feeling for the monarchy is still alive, do not crimes of *lèse-majesté* arouse the general indignation? In democratic countries do not insults levelled at the people unleash the same anger? Thus we cannot draw up a catalogue of those sentiments whose violation constitutes the criminal act. Such feelings are indistinguishable from others save by one characteristic: they are shared by normal and average individuals of the same society. Thus the rules

forbidding those acts for which the penal law provides sanctions are the sole ones to which the celebrated legal axiom, 'No man is presumed ignorant of the law', can be applied without exaggeration. Since the rules are inscribed upon everyone's conscience, all are aware of them and feel that they are founded upon right. At least this is true for the normal condition. If adults are encountered who are ignorant of these basic rules or refuse to recognize their authority, such ignorance or insubordination are irrefutably symptoms of pathological perversion. Or if by chance some penal rule persists for some time despite being disputed by everyone, it is because of a conjunction of exceptional circumstances, which are consequently abnormal – and such a state of affairs can never endure.

This explains the special manner in which penal law becomes codified. All written law serves a dual purpose: to prescribe certain obligations, and to define the sanctions attached to them. In civil law, and more generally in every kind of law where sanctions are restitutory, the legislator approaches and resolves these two problems separately. First he determines the nature of the obligation as exactly as possible; only then does he state the manner in which sanctions should be applied. For example, in the chapter of the French civil code devoted to the respective duties of husband and wife, these rights and duties are spelt out in a positive way, but nothing is said as to what happens when these duties are not fulfilled by one or the other party. The sanction must be sought elsewhere in the code. Occasionally the sanction is even taken totally for granted. Thus Article 214 of the civil code prescribes that the wife must live with her husband; one may deduce that the husband can oblige her to return to the marital home, but this sanction is nowhere formally laid down. By contrast, penal law prescribes only sanctions and says nothing about the obligations to which they relate. It does not ordain that the life of another person must be respected, but ordains the death of the assassin. It does not first state, as does civil law: 'This is the duty'; but states immediately: 'This is the punishment.' Undoubtedly if the act is punished, it is because it is contrary to a mandatory rule, but this rule is not expressly spelt out. There can be only one

reason for this: it is because the rule is known and accepted by everybody. When a customary law acquires the status of a written law and is codified, it is because litigious questions require a solution more closely defined. If the custom continued quietly to function, provoking no argument or difficulty, there would be no reason for it to undergo this transformation. Since penal law is only codified so as to establish a sliding scale of penalties, it is because a custom by itself can give rise to doubt. Conversely, if rules whose violation entails punishment need no juridical expression it is because they are not a subject of dispute, and because everyone feels their authority.

It is true that sometimes the Pentateuch does not lay down sanctions, although, as we shall see, it contains little else than penal rules. This is the case for the Ten Commandments, as they are formulated in Exodus, chapter 20 and Deuteronomy, chapter 5. But this is because the Pentateuch, although it fulfils the function of a code, is properly not one. Its purpose is not to gather together into a single system and detail with a view to their application the penal rules followed by the Jews. So far short does it fall of forming a codification that the various sections comprising it do not even seem to have been drawn up at the same time. It is above all a summary of the traditions of all kinds through which the Jews explained to themselves in their own way the origins of the world, of their society and of their main social practices. Thus if the Pentateuch enunciates certain duties to which punishments were certainly attached, this is not because they were unknown or failed to be acknowledged by the Jews, or because it was necessary to reveal them to them. On the contrary, since the book is a mere compilation of national legends we may be sure that all it contained was graven on everybody's conscience. Nevertheless it was essential to recapitulate in a set form the popular beliefs about the origins of these precepts, the historical circumstances in which it was assumed that they had been promulgated, and the sources of their authority. From this viewpoint, therefore, the determination of punishments becomes something incidental.[3]

For the same reason the operation of repressive justice always tends to some extent to remain diffuse. In very

different types of society it is not exercised through a special magistrate, but society as a whole shares in it to a greater or lesser degree. In primitive societies where, as we shall see, law is wholly penal in character, it is the people assembled together who mete out justice. This was the case for the primitive Germans. In Rome, whereas civil matters fell to the praetor, criminal ones were judged by the people, at first by the *comices curiates*, and then, from the Law of the Twelve Tables onwards, by the *comices centuriates*. Until the end of the Republic, although in fact the people had delegated its powers to standing commissions, they remained the supreme judges in these kinds of cases. In Athens, under the legislation of Solon, criminal jurisdiction fell in part to the *Ηλιαία*, a huge collegial body which nominally included all citizens over the age of thirty. Lastly, in Germano-Roman nations society intervened in the exercise of these same functions in the form of the jury. Thus the diffuse state which pervades this sphere of judicial power would be inexplicable if the rules whose observance it ensures, and in consequence the sentiments which these rules reflect, were not immanent in everyone's conscience. It is true that in other cases the power was held by a privileged class or by special magistrates. Yet these facts do not detract from the value as proof of the other ones mentioned. Although the feelings of the collectivity are no longer expressed save through certain intermediaries, it does not follow that these feelings are no longer of a collective nature just because they are restricted to the consciousnesses of a limited number of people. Their delegation to these people may be due either to an ever-growing increase in affairs, necessitating the appointment of special officials, or to the extreme importance assumed by certain personages or classes in society, which authorizes them to be the interpreters of its collective sentiments.

Yet crime has not been defined when we have stated that it consists of an injury done to the collective sentiments, since some of these may be wounded without any crime being committed. Thus incest is fairly generally an object of aversion, and yet it is a purely immoral act. The same holds good for breaches of sexual honour committed by a woman outside marriage by yielding her liberty utterly to another or

by receiving the surrender of his liberty. Thus the collective sentiments to which a crime corresponds must therefore be distinguished from other sentiments by some striking characteristic. They must be of a certain average intensity. Not only are they written upon the conscience of everyone, but they are deeply written. They are in no way mere faltering and superficial caprices of the will but emotions and dispositions strongly rooted within us. The extreme slowness with which the penal law evolves demonstrates this. It is not only less easily modifiable than custom but is the one sector of positive law least amenable to change. For instance, if we observe what the lawgivers have accomplished since the beginning of the century in the different spheres of the law, innovations in penal law have been extremely rare and limited in scope. By contrast, new rules have proliferated in other branches of the law – civil, commercial, administrative or constitutional. If we compare penal law as laid down in Rome by the Law of the Twelve Tables with its condition in the classical era, the changes we note are minimal beside those that civil law underwent over the same period. Mainz states that from the Twelve Tables onwards the main crimes and offences were fixed: 'For ten generations the calendar of public crimes was not added to save by a few laws which punished embezzlement of public funds, conspiracy, and perhaps *plagium*.' As for private offences, only two new ones were recognized: rape (*actio bonorum vi raptorum*) and malicious damage (*damnum injuria datum*). Such is the position everywhere. In the lower forms of society, as will be seen, law is almost exclusively of a penal kind, and consequently remains unchanged. Generally, religious law is always repressive: it is essentially conservative. This unchangeable character of penal law demonstrates the strength of resistance exerted by the collective sentiments to which it corresponds. Conversely, the great malleability of purely moral laws, and the relative swiftness with which they evolve, demonstrates the lesser strength of the sentiments underlying them. They have either developed more recently and have not yet had time to penetrate deeply the individual consciousness, or their roots are in a state of decay and floating to the surface.

A last addition is needed for our definition to be accurate.

If, in general, the sentiments that purely moral sanctions protect, viz., ones diffuse, less intense and less solidly organized than those protected by punishments proper, exceptions still remain. Thus there is no reason to concede that normal filial piety or even the elementary forms of compassion for the most blatant forms of misery are nowadays more superficial sentiments than is the respect for property or public authority. Yet the wayward son and even the most arrant egoist are not treated as criminals. Thus it is not enough for these sentiments to be strongly held; they must be precise. Indeed every single one relates to a very well-defined practice. Such a practice may be simple or complex, positive or negative, viz., consisting in an action undertaken or avoided; but it is always determinate. It is a question of doing or not doing this or that, of not killing or wounding, of uttering a particular formula, or accomplishing a particular rite, etc. By contrast, sentiments such as filial love or charity are vague aspirations to very general intentions. Thus penal rules are notable for their clarity and precision, whilst purely moral rules are somewhat fluid in character. Their indeterminate nature not infrequently makes it hard to formulate any clear definition of them. We may state very generally that people should work, or have compassion for others, etc., but we cannot determine precisely the manner or extent to which they should do so. Consequently there is room here for variations and shades of meaning. By contrast, because the sentiments embodied in penal rules are determinate, they possess a much greater uniformity. As they cannot be interpreted in different ways, they are everywhere the same.

II

Thus, summing up the preceding analysis, we may state that an act is criminal when it offends the strong, well-defined states of the collective consciousness.[4]

Normally this proposition is scarcely disputed, although usually we give it a meaning very different from the one it

Source II: *Ibid.* pp. 47–9. Translated by W. D. Halls.

should have. It is taken as if it expressed, not the essential characteristic of crime, but one of its repercussions. We well know that crime offends very general sentiments, but ones which are strongly held. But it is believed that their generality and strength spring from the criminal nature of the act, which consequently still remains wholly to be defined. It is not disputed that any criminal act excites universal disapproval, but it is taken for granted that this results from its criminal nature. Yet one is then hard put to it to state what is the nature of this criminality. Is it in a particularly serious form of immorality? I would concur, but this is to answer a question by posing another, by substituting one term for another. For what immorality *is* is precisely what we want to know – and particularly that special form of immorality which society represses by an organized system of punishments, and which constitutes criminality. Clearly it can only derive from one of several characteristics common to all varieties of crime. Now the only characteristic to satisfy that condition refers to the opposition that exists between crime of any kind and certain collective sentiments. It is thus this opposition which, far from deriving from the crime, constitutes the crime. In other words, we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness. We do not condemn it because it is a crime, but it is a crime because we condemn it. As regards the intrinsic nature of these feelings, we cannot specify what that is. They have very diverse objects, so that they cannot be encompassed within a single formula. They cannot be said to relate to the vital interests of society or to a minimum of justice. All such definitions are inadequate. But by the mere fact that a sentiment, whatever may be its origin and purpose, is found in every consciousness endowed with a certain degree of strength and precision, every act which disturbs it is a crime. Present-day psychology is increasingly turning back to Spinoza's idea that things are good because we like them, rather than that we like them because they are good. What is primary is the tendency and disposition: pleasure and pain are only facts derived from this. The same holds good for social life. An act is socially evil because it is rejected by society. But, it will be contended, are there no

collective sentiments which arise from the pleasure or pain which society feels when it comes into contact with their objects? This is doubtless true, but all such sentiments do not originate in this way. Many, if not the majority, derive from utterly different causes. Anything which obliges our activity to take on a definite form can give rise to habits which result in dispositions which then have to be satisfied. Moreover, these dispositions alone are truly basic ones. The others are only special forms of them, and are more determinate. Thus to find charm in a particular object, collective sensibility must already have been so constituted as to be able to appreciate it. If the corresponding sentiments are abolished, an act most disastrous for society will not only be able to be tolerated, but honoured and held up as an example. Of itself pleasure is incapable of creating a disposition out of nothing; it can only link those dispositions which already exist to a particular end, provided that end is in accord with their original nature.

III

The very nature of the restitutory sanction is sufficient to show that the social solidarity to which that law corresponds is of a completely different kind.

The distinguishing mark of this sanction is that it is not expiatory but comes down to a mere *restoration of the status quo ante*. Suffering proportioned to his offence is not inflicted upon him who has broken the law or has failed to realize it. He is merely condemned to submit to it. If certain acts have already been performed, the judge restores them to what they should be. He pronounces what the law is and does not speak of punishments. Damages awarded have no penal character: they are simply the means of putting back the clock so as to restore the past as far as possible to its normal state. It is true that Tarde believed he had found a kind of civil penal law in the awarding of costs, which are always borne by the losing party. But, taken in this sense, the term has no more than metaphorical value. For there to be a punishment there should

Source III: *Ibid.* pp. 79–83. Translated by W. D. Halls.

at least be some proportionality between the punishment and the wrong, and for this one would need to establish exactly the degree of seriousness of the wrong done. But in fact the loser of the case pays its costs even if his intentions were innocent and he is guilty of nothing more than ignorance. The reasons for this rule thus seem to be completely different. Since justice is not administered free, it seems equitable that costs should be borne by the one who has occasioned them. Moreover, although possibly the prospect of such costs may halt the over-hasty litigant, this is not enough to be considered a punishment. The fear of ruin, which normally is a sequel to idleness and neglect, may make the business man energetic and diligent. Yet ruin is not the penal sanction, in the exact connotation of the term, for his shortcomings.

Failure to observe these rules is not even sanctioned by a diffused punishment. The plaintiff who has lost his case is not disgraced nor is his honour impugned. We can even envisage the rules being different without a feeling of revulsion. The idea that murder can be tolerated sets us up in arms, but we are very ready to accept that the law of inheritance might be modified, and many even conceive that it could be abolished. At least it is a question that we would not be unwilling to discuss. Likewise we agree without difficulty that the laws regarding easements charges or usufruct might be framed differently, that the mutual obligations of buyer and seller might be determined in another way, and that administrative functions might be allocated on other principles. Since such prescriptions do not correspond to any inner feeling, and since generally we do not know their scientific justification, since this knowledge does not exist, they strike no deep roots in most of us. There are doubtless exceptions. We do not tolerate the idea that an undertaking entered into which is contrary to morals or obtained either by violence or fraud can bind the contracting parties. Thus when public opinion is confronted by cases of this nature it shows itself less indifferent than we have just asserted. It adds its disapprobation to the legal sanction, causing it to weigh more heavily. This is because there are no tight divisions between the various domains of moral life. On the contrary, they form a continuum, and consequently between them lie contiguous areas where diffe-

rent characteristics may be found simultaneously. However, the proposition enunciated above remains true in the very large majority of the cases. It demonstrates that rules whose sanction is restitutory either do not form part of the collective consciousness at all, or subsist in it only in a weak state. Repressive law corresponds to what is at the heart and centre of the common consciousness. Purely moral rules are already less central to it. Finally, restitutory law springs from the outermost areas of consciousness, extending well beyond it. The more it becomes truly restitutory, the more it takes its distance.

Moreover, this characteristic is evidenced in the way it functions. Whereas repressive law tends to stay diffused throughout society, restitutory law sets up for itself ever more specialized bodies; consular courts, and industrial and administrative tribunals of every kind. Even in its most general sector, that of civil law, it is administered only through special officials – magistrates, lawyers, etc., who have been equipped for this role by a very special kind of training.

Yet although these rules are more or less outside the collective consciousness, they do not merely concern private individuals. If this were so restitutory law would have no common bonds with social solidarity, for the relationships it regulates would link individuals to one another without linking them to society. They would be mere occurrences of private life, as, for instance, are relationships of friendship. But it is far from true that society is not present in this sphere of juridical activity. It is generally the case that it does not intervene by itself and of its own volition: it must be solicited to do so by the parties concerned. But although it has to be invoked, its intervention is nevertheless the essential cog in the mechanism, since it alone causes it to function. It is society which lays down the law through the body representing it.

However, it has been maintained that this role was in no way especially social, but came down to being that of a conciliator between private interests. In consequence it was held that any private individual could fulfil it, and that if society assumed it, this was solely for reasons of convenience. But it is entirely inaccurate to cast society as a kind of third-party arbitrator between the other parties. When it is induced

to intervene it is not to reconcile individual interest. It does not search for what might be the most advantageous solution for the two protagonists, nor does it suggest a compromise. It rather applies to the particular case submitted to it the general and traditional rules of law. Now law is pre-eminently a social matter, whose object is totally different from the interests of the litigants. The judge who investigates a divorce petition is not concerned to know whether this separation is really desirable for husband and wife, but whether the causes invoked for it fall into one of the stipulated legal categories.

However, to assess accurately the importance of the social intervention it must be observed not only at the moment when the sanction is applied, but also when it is instituted.

The social intervention is in fact necessary either to lay the foundation for, or to modify, a number of legal relationships regulated by this form of law, and for which the assent of the interested parties is not adequate either to institute or alter them. In particular, of this nature are those relationships which concern personal status. Although marriage is a contract, the partners can neither draw up or rescind it at will. The same holds good for all other domestic relationships and, *a fortiori*, for all those regulated by administrative law. It is true that obligations of a peculiarly contractual kind may be entered into and abrogated by mere agreement between the parties. Yet it must be borne in mind that if a contract has binding force it is society which confers that force. Let us assume that it does not bestow its sanction upon obligations that are contracted; these then become pure promises possessing only moral authority.[5] Every contract therefore presumes that, behind the parties binding each other, society is there, quite ready to intervene and enforce respect for undertakings entered into. Thus it only lends this obligatory force to contracts which in themselves have a social value, viz., those in conformity with the rules of law. We shall even see that on occasion its intervention is still more positive. It is therefore present in every relationship which is determined by restitutory law, even those which appear most wholly private, and its presence, although at least in normal conditions not felt, is no less essential.[6]

Since the rules where sanctions are restitutory do not

involve the common consciousness, the relationships that they determine are not among those which affect everyone without distinction. This means that they are established directly not between the individual and society, but between limited and particular sectors of society, which they link together. On the other hand, however, since society is not absent, in fact it needs be concerned to some degree, and feel repercussions. Then, depending upon the intensity with which these are felt, it intervenes at a greater or lesser distance, more or less actively through the mediation of special bodies charged with representing it. These relationships are therefore very different from those regulated by repressive law, for the latter link directly, without any intermediary, the individual consciousness to that of society, i.e., the individual to society.

But these relationships can assume two very different forms. At one time they are negative and amount to mere abstention; at another, they are positive and require cooperation. To these two categories of rules, which determine either kind of relationships, there correspond two kinds of social solidarity between which we need to distinguish.

IV

In a small society, since everyone is clearly placed in the same conditions of existence, the collective environment is essentially concrete. It is made up of human beings of every kind who people the social horizon. The states of consciousness which represent it are therefore of the same character. First, they relate to precise objects, such as a particular animal, tree, plant, or natural force, etc. Then, since everyone is similarly placed in relation to these things, they affect every individual consciousness in the same way. The whole tribe, provided it is not too extensive, enjoys or suffers equally the advantages and inconveniences of the sun and rain, heat and cold, a particular river or spring, etc. The collective impressions resulting from the fusion of all these individual impressions are thus determined in their form, as they are in their objects. Consequently

Source IV: *Ibid.* pp. 272–6. Translated by W. D. Halls.

the common consciousness has a definite character. But this consciousness alters in nature as societies grow more immense. Because they are spread over a much vaster area, the common consciousness is itself forced to rise above all local diversities, to dominate more the space, and consequently to become more abstract. Few things, save general ones, can be common to all these various environments. It is no longer a question of a particular animal, but of a particular species; not this spring, but these springs; not this forest, but forest *in abstracto*.

Moreover, because living conditions are no longer everywhere the same, these common objects, whatever they may be, can no longer determine so completely identical feelings everywhere. For the collectivity the results therefore lack the same distinctness, and this is even more so because the component elements are more unlike. The more differences between the individual portraits that have served to make a composite portrait, the more imprecise the latter is. It is true that local collective consciousnesses can retain their individuality within the general collective consciousness and, since they encompass narrower horizons, they can the more easily remain concrete. But we know that gradually they vanish into the general consciousness as the different social segments to which they correspond fade away.

Perhaps the fact which best demonstrates this increasing tendency of the common consciousness is the parallel transcendence of the most vital of all its elements – I refer to the notion of divinity. Originally the gods were not apart from the universe, or rather there were no gods, but only sacred beings. But the sacred character with which they were invested was not related to any external entity as its source. The animals or plants of the species which serve as the clan totem are the object of worship. But this is not because a principle *sui generis* coming from outside imparts to them their divine nature. This nature is intrinsic to them; they are divine in themselves. But gradually the religious forces become detached from the things of which they were at first only the attributes, and they are reified. In this way is formed the notion of spirits or gods who, while preferring this or that location, nevertheless exist outside the particular objects to which they are especially attached. This fact alone renders

them less concrète. However, whether they are many in number or have been reduced to a certain unity, they are still immanent in the world. Partly separated from things, they still exist in space. Thus they remain very close to us, continually intermingling with our life. Greco-Roman polytheism, which is a higher and better organized form of animism, marks a further step towards transcendence. The dwelling-place of the gods becomes more clearly distinct from that of man. Having withdrawn to the mysterious heights of Olympus or to the depths of the earth, except intermittently they no longer intervene personally in human affairs. But it is only with Christianity that God finally goes beyond space. His kingdom is no longer of this world. The dissociation of nature and the divine becomes so complete that it even degenerates into hostility. At the same time the notion of divinity becomes more general and abstract, for it is formed not from the sensations, as it was in the beginning, but from ideas. The God of humanity is necessarily not so comprehensible as those of the city or clan.

Moreover, at the same time as religion, legal rules become universalized, as do those or morality. First bound to local circumstances, to racial or climatic peculiarities, etc., they gradually break loose from these and at the same time become more general. What renders this increase in generality more apparent is the unbroken decline in formalism. In lower societies the form of behaviour – even its external form – is predetermined even in detail. The way in which men must take food, or dress, in every situation, the gestures they must perform, the formulas they must pronounce, are precisely laid down. On the other hand, the more distant the point of departure, the more moral and legal prescriptions lose clarity and preciseness. They no longer regulate any save the most general forms of behaviour, and these only in a very general way, stating what should be done, but not how it should be done. But everything definite is expressed in a definite form. If collective sentiments were as determinate as once they were, they would be expressed in no less determinate a fashion. If the concrete details of action and thought were as uniform, they would be as obligatory.

It has often been remarked that civilization has tended to

become more rational and logical. We can now see the reason for this. That alone is rational which is universal. What defies the understanding is the particular and the concrete. We can only ponder effectively upon the general. Consequently the closer the common consciousness is to particular things, the more exactly it bears their imprint and thus the more unintelligible it is. From this derives the effect that primitive civilizations have upon us. Not being able to reduce them to logical principles, we are inclined to view them only as strange and fortuitous combinations of heterogeneous elements. In reality, there is nothing artificial about them. But we must look for their determining causes in sensations and impulsions of the sensibility, and not in concepts. If this is so, it is because the social environment for which they have been made is not sufficiently extensive. On the other hand, when civilization is developed over a vaster field of action, when it relates to more people and things, general ideas necessarily appear and there become paramount. The notion of mankind, for example, replaces in law, morality and religion that of the Roman which, being more concrete, is more difficult to understand. Thus it is the growth in the size of societies and their greater density which explain this great transformation.

The more general the common consciousness becomes, the more scope it leaves for individual variations. When God is remote from things and men, his action does not extend to every moment in time and to every thing. Only abstract rules are fixed, and these can be freely applied in very different ways. Even then they have neither the same ascendancy nor the same strength of resistance. Indeed, if usages and formulas, when they are precise, determine thought and action with a compulsion analogous to that of the reflexes, by contrast these general principles can only be translated into facts with the assistance of the intelligence. Yet once reflective thinking has been stimulated, it is not easy to set its bounds. When it has gathered strength, it spontaneously develops beyond the limits assigned to it. At the outset certain articles of faith are pronounced to be beyond discussion, but later discussion extends to them. There is a desire to account for them, the reason for their existence is questioned, and however they fare in this scrutiny, they relinquish some part of their strength.

For ideas arising from reflection have never the same constraining power as instincts. Thus actions which have been deliberated upon have not the instant immediacy of involuntary ones. Because the collective consciousness becomes more rational, it thus becomes less categorical and, for this reason also, is less irksome to the free development of individual variations.

NOTES

1 Yet this is the method that Garofalo followed. Undoubtedly he appears to abandon it when he acknowledges the impossibility of drawing up a list of actions which are universally punished. . . . Yet in the end he comes back to this method since, all in all, the natural crime for him is one which disturbs those sentiments everywhere fundamental to the penal law, viz., a fixed element in the moral sense, and that alone. But why should a crime which disturbs a sentiment peculiar only to certain types of society be less of a crime than the others? Thus Garofalo is led to deny the character of crime to acts which have been universally acknowledged to be criminal among certain social species, and in consequence is led to limit artificially the bounds of criminality. The result is that his notion of crime is singularly inadequate. It is also very incomplete, for the author does not include in his comparisons all types of society, but excludes a large number which he characterizes as abnormal. A social fact may be stated to be abnormal in relation to the type of species, but a species itself cannot be abnormal. The two words are a contradiction in terms. However interesting Garofalo's attempt to arrive at a scientific notion of crime may be, it is not carried out using a sufficiently exact and accurate method. This is clearly shown in his use of the expression 'natural crime'. Are not all crimes natural? We are probably seeing here a reversion to Spencer's doctrine, in which social life is only really natural in industrial societies. Unfortunately, nothing can be more untrue.

2 We do not see what scientific grounds Garofalo has for saying that the moral sentiments at present possessed by the civilized portion of humanity constitute a morality 'not capable of being lost, but whose development is continually growing'. What grounds are there for setting bounds to the changes which may occur, whether in one direction, or the other?

3 The only real exceptions to this peculiarity of the penal code occur when it is an official act of authority which creates the offence. In that case the duty is generally defined independently of its sanction. Later we shall explain the reason for his exception.

4 We shall not go into the question as to whether the collective consciousness is like that of the individual. This term merely denotes for us the sum

total of social similarities, without prejudice to the category by which this system of phenomena should be defined.

5 And even that moral authority derives from custom, and hence from society.

6 Here we must limit ourselves to these general remarks common to every form of restitutory law.

CHAPTER 3

Crime and Punishment

In the first place punishment constitutes an emotional reaction. This characteristic is the more apparent in less cultured societies. Indeed primitive peoples punish for the sake of punishing, causing the guilty person to suffer solely for the sake of suffering and without any advantage for themselves from the suffering they inflict upon him. The proof of this is that they do not aim to strike back fairly or usefully, but only for the sake of striking. Thus they punish animals which have committed the act stigmatized or even inanimate things which have been its passive instrument.[1] When the punishment is applied solely to people, it often extends well beyond the guilty person and strikes even the innocent – his wife, children or neighbours, etc. This is because the passions which lie at the heart of punishment die down only when they are spent. Thus if, after having destroyed the one who was their most immediate cause, some fire still burns in them, quite automatically they extend further. Even when they are sufficiently moderate in intensity to attack only the guilty person they manifest their presence by the tendency they have to bear down unduly against the act to which they are reacting. For this reason there arose the refinements of pain that were added to the capital punishment. In Rome the thief had not only to give back the object stolen, but also to pay a double or even quadruple fine. Moreover, is not the aim of the very widespread punishment of talion to assuage the passion for vengeance?

Nowadays, however, it is said that punishment has changed

Source I: Durkheim, E. *De la Division du travail social, op. cit.*, pp. 52–64.
This translation, by W. D. Halls, will appear in *The Division of Labour in Society* (London, Macmillan, forthcoming, 1984)

in nature. Society no longer punishes to avenge, but to defend itself. In its hands the pain it inflicts is only a systematic instrument for its protection. Society punishes not because the punishment of itself affords it some satisfaction, but in order that the fear of punishment may give pause to those who are evilly inclined. It is no longer wrath which governs repression, but a well premeditated foresight. Thus the preceding remarks cannot be generally applied: they may only concern the primitive form of punishment and not be extended to cover its present-day form.

Yet, in order to justify so radical a distinction between these two sorts of punishment it is not enough to demonstrate that they are employed for different ends. The nature of a practice does not necessarily alter because the conscious intentions of those implementing it are modified. Indeed it could already have fulfilled the same role in former times without this being perceived. In that case why should it be transformed by the mere fact that we realize more fully the effects that it produces? It adapts itself to the new conditions of existence created for it without thus undergoing any essential changes. This is what has happened in the case of punishment.

It would indeed be mistaken to believe that vengeance is mere wanton cruelty. It may very possibly constitute by itself an automatic, purposeless reaction, taken on an emotional and senseless impulse, in an unreasoned compulsion to destroy. But in fact what it seeks to destroy was a threat to us. Therefore in reality it constitutes a veritable act of defence, albeit instinctive and unreflecting. We wreak vengeance only upon what has done us harm, and what has done us harm is always dangerous. The instinct for revenge is, after all, merely a heightened instinct of self-preservation in the face of danger. Thus it is far from true that vengeance has played in human history the negative and sterile role attributed to it. It is a weapon of defence, which has its own worth – only it is a rough and ready weapon. As it has no conception of the services it automatically renders it cannot consequently be regulated. It strikes somewhat at random, a prey to the unseeing forces which urge it on, and with nothing to curb its accesses of rage. Today, when we are better aware of the purpose to be achieved, we also know better how to use the

means at our disposal. We protect ourselves more systematically, and consequently more effectively. But from the very beginning this result was realized, although less perfectly. Thus between the punishment of today and yesterday there is no great gulf, and consequently it had no need to change to accommodate itself to the role that it plays in our civilized societies. The whole difference lies in the fact that punishment now produces its effects with a greater awareness of what it is about. Now, although the individual or social consciousnesses do not fail to influence the reality they highlight, they have no power to change the nature of that reality. The internal structure of the phenomena remains unchanged, whether conscious or not. We may therefore expect the essential elements of punishment to be the same as before.

And indeed punishment has remained an act of vengeance, at least in part. It is claimed that we do not make the guilty person suffer for the sake of suffering. It is nonetheless true that we deem it fair that he should suffer. We may be wrong, but this is not what is at issue. We are seeking for the present to define punishment as it is or has been, and not how it should be. Certainly the term 'public vindication' which recurs incessantly in the language of the law-courts, is no vain expression. If we suppose that punishment can really serve to shield us in the future, we esteem that above all it should be an *expiation* for the past. What proves this is the meticulous precautions we take to make the punishment fit the seriousness of the crime as exactly as possible. These precautions would be inexplicable unless we believed that the guilty person must suffer because it is he who has done the injury, and indeed must suffer in equal measure. In fact this gradation is unnecessary if punishment is only a defence mechanism. It would undoubtedly be dangerous for society if the gravest criminal undertakings were placed on the same level as mere minor offences. Yet in most cases there could only be advantage in placing the minor ones on the same level as the serious ones. One cannot take too many precautions against one's enemy. Can we say that the perpetrators of the most trivial offences possess natures any less perverse and that, to counteract their evil instincts, less onerous punishments will suffice? But although their tendencies may be less vicious,

they are not thereby less intense. Thieves are as strongly disposed to theft as murderers to homicide. The resistance shown by the former category is in no way weaker than that of the latter. Thus, to overcome it, we should have recourse to the same means. If, as has been said, it was solely a matter of repelling a harmful force by an opposing one, the latter's intensity should be merely commensurate with that of the former, without the quality of the harmful force being taken into consideration. The scale of punishments should therefore comprise only very few gradations. The punishment should vary only according to whether the subject is more or less hardened a criminal, and not according to the nature of the criminal act. An incorrigible thief should be treated like an incorrigible murderer. But in fact, even when it is shown that the guilty person is definitely incurable, we do not feel bound to mete out excessive punishment to him. This demonstrates that we have remained true to the principle of talion, although we conceive of it in a more lofty sense that once we did. We no longer measure in so material and rough terms either the gravity of the fault or the degree of punishment. But we still consider that there should be an equilibrium between the two elements, whether we derive any advantage or not in striking such a balance. Thus punishment has remained for us what it was for our forefathers. It is still an act of vengeance, since it is an expiation. What we are avenging, and what the criminal is expiating, is the outrage to morality.

There is above all one form of punishment where this passionate character is more visible than elsewhere: it is shame which doubles most punishments, and which increases with them. Very often it serves no purpose. What good does it do to disgrace a man who is no longer to live in the society of his peers and who has more than abundantly proved by his behaviour that more fearful threats have failed to deter him? To disgrace him is understandable when there is no other punishment available, or when it is necessary to supplement some comparatively trivial material penalty. Where this is not the case punishment does the same task twice over. One may even say that society only resorts to legal punishments when others are inadequate. If this is so, why continue with the

latter? They are a form of additional tribulation which serve no purpose, or one whose sole reason is the need to repay evil with evil. They are so much the result of instinctive, irresistible feelings that they often spread to innocent objects. Thus the scene of the crime, the tools used in it, the relatives of the guilty person – all sometimes share in the opprobrium which we heap upon him. The causes which give rise to this more widely diffused repression are also the same as those of the organized repression which accompanies it. Moreover, we need only to observe how punishment operates in the law-courts to acknowledge that its motivating force is entirely emotional. For it is to the emotions that both prosecuting and defending counsel address themselves. The latter seeks to arouse sympathy for the guilty person, the former to stir up the social sentiments which have been offended by the criminal act, and it is under the influence of these opposing actions that the judge delivers sentence.

Thus the nature of punishment has remained essentially unchanged. All that can be said is that the necessity for vengeance is better directed nowadays than in the past. The spirit of foresight which has been awakened no longer leaves the field so clear for the blind play of passion; it contains it within set limits, opposing absurd acts of violence and damage inflicted wantonly. More enlightened, such passionate action spreads itself less randomly. We no longer see it turn upon the innocent, in order to be satisfied come what may. Nevertheless it lies at the very heart of the penal system. We can therefore state that punishment consists of a passionate reaction graduated in intensity.[2]

Whence, however, does this reaction spring? Is it from the individual or from society?

We all know that it is society which punishes. Maybe, however, it does not do so on its own behalf. What places beyond doubt the social character of punishment is that once it is pronounced, it cannot be revoked save by government, in the name of society. If it were a satisfaction granted to individuals, these would always be the ones to decide whether to commute it: one cannot conceive of a privilege forced upon one which the beneficiary cannot renounce. If it is society

alone which exercises repression, it is because it is harmed even when the harm is done to individuals, and it is the attack upon society which is repressed by punishment.

Yet we can cite cases where the carrying out of the punishment depended upon the will of individuals. In Rome certain offences were punished by a fine which went to the injured party, who could waive it or make it the subject of bargaining: such was the case for covert theft, rape, slander and malicious damage. These offences, termed private offences (*delicta privata*), were contrasted with crimes proper, repression of which was carried out in the name of the city. The same distinction is found in Greece and among the ancient Jews.[3] Among more primitive peoples punishment seems occasionally to be a matter even more completely private, as the practice of the *vendetta* tends to show. Such societies are made up of elementary aggregates, almost of a family nature, which may conveniently be designated *clans*. When an assault is committed by one or several members of a clan against another clan, it is the latter which itself punishes the wrong inflicted upon it. What, at least in appearance, gives even more importance to these facts from the viewpoint of theory, is that it has been frequently maintained that the *vendetta* was originally the sole form of punishment. Thus at first punishment may have consisted of private acts of vengeance. But then, if today society is armed with the right to punish, it seems that this can only be by virtue of some sort of delegation by individuals. Society is only their agent. It is their interests that it looks after in their stead, probably because it looks after them better. But they are not properly those of society itself. In the beginning individuals took vengeance themselves; now it is society which avenges them. Yet, since the penal law cannot have changed its nature through this simple transfer, there is thus nothing peculiarly social about it. If society appears to play a predominant role it is only as a substitute for individuals.

Yet however widely held this theory may be, it runs counter to the best established facts. We cannot instance a single society where the *vendetta* was the primitive form of punishment. On the contrary, it is certain that penal law was essentially religious in origin. This is clearly a fact for India

and Judaea, since the law practised there was considered to be one of revelation.[4] In Egypt the ten books of Hermes, which contained the criminal law and all other laws relating to the governance of the State, were called sacerdotal, and Elien asserts that from earliest times the Egyptian priests exercised judicial power. The same holds true for ancient Germany. In Greece justice was considered to be an emanation from Zeus, and the sentiment as a vengeance from the god. In Rome the religious origins of the penal law are made clear by ancient traditions, by archaic practices which subsisted until a very late date, and by legal terminology itself. But religion is something essentially social. Far from pursuing only individual ends, it exercises constraint over the individual at every moment. It obliges him to observe practices which are irksome to him and sacrifices, whether great or small, which cost him something. He must give from his possessions the offerings which he is constrained to present to the divinity. He must take from his work or leisure the necessary moments of time for the performance of rites. He must impose upon himself every kind of privation that is commanded of him, and even renounce life itself if the gods so decree. The religious life is made up entirely of abnegation and altruism. Thus if criminal law was originally religious law, we may be sure that the interests it served were social. It is their own offences that the gods avenge by punishment, and not those of individuals. But the offences against the gods are offences against society.

Thus in lower societies the most frequent offences are those which are injurious to the public interest: offences against religion, customs, authority, etc. We have only to see in the Bible, in the laws of Manou, in the records surviving of ancient Egyptian law, how small in comparison is the importance given to prescripts which protect individuals. This is in contrast to the abundant growth of repressive legislation concerning the various forms of sacrilege, failure to observe the various religious obligations, and the requirements of ceremonial, etc. At the same time these crimes are those most severely punished. Among the Jews the most abominable crimes are those committed against religion. Among the ancient Germans two crimes alone were punished by death, according to Tacitus: treason and desertion. According to

Confucius and Meng Tseu, impiety is a more grievous transgression than assassination. In Egypt the slightest act of sacrilege was punished by death. In Rome, at the top of the scale of criminality was to be found *crimen perduellionis*.

But what then are these privatę punishments, instances of which we noted earlier? They are of a mixed nature, partaking of both a repressive and a restitutory sanction. Thus the private offence in Roman law represents a kind of intermediate stage between real crime and the purely civil offence. It has features of both and hovers on the bounds of both domains. It is an offence, in the sense that the sanction prescribed by the law does not consist merely in putting matters to rights; the offender is not only obliged to make good the damage that he has caused, but he owes something else in addition, an act of expiation. However, it is not entirely a crime since, although it is society which pronounces the sentence, it is not society which is empowered to apply it. This is a right that society confers upon the injured party, who alone can exercise it freely.[5] Likewise the *vendetta* is clearly a punishment that society recognizes as legitimate, but leaves to individuals the task of carrying out. Thus these facts merely confirm what we have stated regarding the nature of the penal system. If this kind of intermediate sanction is partly a private matter, to a corresponding extent it is not a punishment. Its penal nature is proportionately less pronounced when its social character is less evident, and vice versa. Private vengeance is thus far from being the prototype of punishment; on the contrary, it is only an incomplete punishment. Far from crimes against the person being the first to be repressed, in the beginning they are merely situated on the threshold of the penal law. They moved up only in the scale of criminality as society correspondingly became more completely in control of them. This process, which we do not need to describe, was certainly not effected by a mere act of transferral. On the contrary, the history of this penal system is nothing but a progressive succession of encroachments by society upon the individual, or rather upon the primary groupings which it comprised. The effect of these encroachments was increasingly to substitute the law relating to individuals for that relating to society.[6]

But the characteristics outlined above belong just as much

to the diffused repression which follows acts that are merely immoral as to legal repression. What distinguishes the latter, as we have said, is that it is organized. But in what does this organization consist?

When we reflect upon penal law as it functions in present-day societies we represent it as a code in which very precise punishments are attached to crimes equally precisely defined. It is true that the judge enjoys a certain latitude in applying to each particular case these general dispositions. But in its essentials the punishment is predetermined for each category of criminal acts. This elaborate organization is not, however, an indispensable element in the punishment, because many societies exist in which punishments are not prescribed in advance. In the Bible there are numerous prohibitions which are utterly categorical but which are nevertheless not sanctioned by any expressly formulated punishment. Their penal character, however, is not in dispute, for, although the texts remain silent regarding the punishment, at the same time they express so great an abhorrence for the forbidden act that we cannot suspect for a moment that it will remain unpunished. Thus there is every reason to believe that this silence on the part of the law simply relates to the fact that how a crime was to be repressed was not determined. Indeed many of the stories in the Pentateuch teach us that there were criminal acts whose criminality was undisputed, but where the punishment was determined only by the judge who applied it. Society was well aware that it was faced with a crime, but the penal sanction which was to be attached to it was not yet defined.[7] Moreover, even among those punishments laid down by the legislator there are many which are not precisely specified. Thus we know that there were different forms of capital punishment which were not all on the same footing. Yet in a great number of cases the texts speak only generally of the death penalty, without stating what manner of death should be inflicted. According to Sumner Maine the same was true of early Rome: the *crimina* were tried before the assembly of the people which, acting in a sovereign capacity, decreed what the punishment was to be by a law, at the same time as establishing the truth of the charge. Moreover, even until the sixteenth century the general principle of the penal system

'was that its application was left to the discretion of the judge, *arbitrio et officio judicis*. . . . Only the judge was not allowed to devise punishments other than those that were customary.' Another consequence of this judicial power was to make dependent upon the judge's discretion even the nature of the criminal act, which was thus indeterminate.

So it is not the regulation of punishments which constitutes the distinctive organization of this kind of repression. Nor is it in the institution of a criminal procedure. The facts we have just cited suffice to show that for a long time this was lacking. The only organization met with everywhere that punishment proper existed is thus reduced to the establishment of a court of law. In whatever way this was constituted, whether it comprised the people as a whole or only an élite, whether or not it followed a regular procedure both in investigating the case and in applying the punishment, by the mere fact that the offence, instead of being judged by an individual, was submitted for consideration to a properly constituted body and that the reaction of society was expressed through the intermediary of a well-defined organism, it ceased to be diffuse: it was organized. The organization might have been more elaborate, but henceforth it existed.

Thus punishment constitutes essentially a passionate reaction, graduated in intensity, which society exerts through the mediation of an organized body over those of its members who have violated certain rules of conduct.

Now the definition of crime we have given quite easily accounts for all these characteristics of punishment.

II

The same is true of punishment. Although it proceeds from an entirely mechanical reaction and from accesses of passionate emotion, which for the most part are unthinking, it continues to play a useful role. But that role is not the one ordinarily perceived. It does not serve, or serves only incidentally, to correct the guilty person or to scare off any possible imitators.

Source II: *Ibid.*, pp. 76–7. Translated by W. D. Halls.

From this dual viewpoint, its effectiveness may rightly be questioned; in any case it is mediocre. Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour. If that consciousness were thwarted so categorically it would necessarily lose some of its power, were an emotional reaction from the community not forthcoming to make good that loss. Thus there would result a relaxation in the bonds of social solidarity. The consciousness must therefore be conspicuously reinforced the moment it meets with opposition. The sole means of doing so is to give voice to the unanimous aversion that the crime does not fail to evoke, and this by an official act, which can only mean suffering inflicted on the wrongdoer. Thus, although a necessary outcome of the causes which give rise to it, this suffering is not gratuitous cruelty. It is a sign indicating that the sentiments of the collectivity have not changed, that the communion of minds sharing the same beliefs remains absolute, and that, in this way, the injury that the crime has inflicted upon society has been made good. This is why it is right to maintain that the criminal should suffer in proportion to his crime, and why theories which deny to punishment any expiatory character appear, in the minds of many, to subvert the social order. In fact such theories could only be put into practice in a society from which almost every trace of the common consciousness had been expunged. Without this necessary act of satisfaction what is called the moral conscience could not be preserved. Thus we may state, without being paradoxical, that punishment is above all intended to have its effect on honest people. Since it serves to heal the wounds inflicted upon collective sentiments, it can only fulfil this role where such sentiments exist, and in so far as they are active. Undoubtedly, by forestalling in minds already distressed any fresh weakening of the collective psyche, punishment cannot indeed prevent such criminal acts from multiplying. But such a result, useful though it is, is merely a particular side-effect. In short, to envisage an exact idea of punishment, the two opposing theories that have been advanced must be reconciled: the one sees in punishment an expiation, the other conceives of it as a weapon for the defence of society. It assuredly does fulfil the function of protecting society, but this

is because of its expiatory nature. This is not because suffering redeems error by virtue of some mystic strength or another, but because it cannot produce its socially useful effect save on this condition.[8]

III

If there is a fact whose pathological nature appears indisputable, it is crime. All criminologists agree on this score. Although they explain this pathology differently, they none the less unanimously acknowledge it. However, the problem needs to be treated less summarily.

Let us in fact apply the rules previously laid down. Crime is not only observed in most societies of a particular species, but in all societies of all types. There is not one in which criminality does not exist, although it changes in form and the actions which are termed criminal are not everywhere the same. Yet everywhere and always there have been men who have conducted themselves in such a way as to bring down punishment upon their heads. If at least, as societies pass from lower to higher types, the crime rate (the relationship between the annual crime figures and population figures) tended to fall, we might believe that, although still remaining a normal phenomenon, crime tended to lose that character of normality. Yet there is no single ground for believing such a regression to be real. Many facts would rather seem to point to the existence of a movement in the opposite direction. From the beginning of the century statistics provide us with a means of following the progression of criminality. It has everywhere increased, and in France the increase is of the order of 300 per cent. Thus there is no phenomenon which represents more incontrovertibly all the symptoms of normality, since it appears to be closely bound up with the conditions of all collective life. To make crime a social illness would be to concede that sickness is not something accidental, but on the contrary derives in certain cases from the fundamental constitution of the living

Source III: *The Rules of Sociological Method and Selected Texts on Sociology and its Method*, translated by W. D. Halls and edited with an introduction by Steven Lukes (London, Macmillan, 1982), pp. 97–103.

creature. This would be to erase any distinction between the physiological and the pathological. It can certainly happen that crime itself has abnormal forms; this is what happens, for instance, when it reaches an excessively high level. There is no doubt that this excessiveness is pathological in nature. What is normal is simply that criminality exists, provided that for each social type it does not reach or go beyond a certain level which it is perhaps not impossible to fix in conformity with the previous rules.[9]

We are faced with a conclusion which is apparently somewhat paradoxical. Let us make no mistake: to classify crime among the phenomena of normal sociology is not merely to declare that it is an inevitable though regrettable phenomenon arising from the incorrigible wickedness of men; it is to assert that it is a factor in public health, an integrative element in any healthy society. At first sight this result is so surprising that it disconcerted even ourselves for a long time. However, once that first impression of surprise has been overcome it is not difficult to discover reasons to explain this normality and at the same time to confirm it.

In the first place, crime is normal because it is completely impossible for any society entirely free of it to exist.

Crime, as we have shown elsewhere, consists of an action which offends certain collective feelings which are especially strong and clear-cut. In any society, for actions regarded as criminal to cease, the feelings that they offend would need to be found in each individual consciousness without exception and in the degree of strength requisite to counteract the opposing feelings. Even supposing that this condition could effectively be fulfilled, crime would not thereby disappear; it would merely change in form, for the very cause which made the well-springs of criminality to dry up would immediately open up new ones.

Indeed, for the collective feelings, which the penal law of a people at a particular moment in its history protects, to penetrate individual consciousnesses that had hitherto remained closed to them, or to assume greater authority – whereas previously they had not possessed enough – they would have to acquire an intensity greater than they had had up to then. The community as a whole must feel them more

keenly, for they cannot draw from any other source the additional force which enables them to bear down upon individuals who formerly were the most refractory. For murderers to disappear, the horror of bloodshed must increase in those strata of society from which murderers are recruited; but for this to happen the abhorrence must increase throughout society. Moreover, the very absence of crime would contribute directly to bringing about that result, for a sentiment appears much more respectable when it is always and uniformly respected. But we overlook the fact that these strong states of the common consciousness cannot be reinforced in this way without the weaker states, the violation of which previously gave rise to mere breaches of convention, being reinforced at the same time, for the weaker states are no more than the extension and attenuated form of the stronger ones. Thus, for example, theft and mere misappropriation of property offend the same altruistic sentiment, the respect for other people's possessions. However, this sentiment is offended less strongly by the latter action than the former. Moreover, since the average consciousness does not have sufficient intensity of feeling to feel strongly about the lesser of these two offences, the latter is the object of greater tolerance. This is why the misappropriator is merely censured, while the thief is punished. But if this sentiment grows stronger, to such a degree that it extinguishes in the consciousness the tendency to theft that men possess, they will become more sensitive to these minor offences, which up to then had had only a marginal effect upon them. They will react with greater intensity against these lesser faults, which will become the object of severer condemnation, so that, from the mere moral errors that they were, some will pass into the category of crimes. For example, dishonest contracts or those fulfilled dishonestly, which only incur public censure or civil redress, will become crimes. Imagine a community of saints in an exemplary and perfect monastery. In it crime as such will be unknown, but faults that appear venial to the ordinary person will arouse the same scandal as does normal crime in ordinary consciences. If therefore that community has the power to judge and punish, it will term such acts criminal and deal with them as such. It is for the same reason that the completely

honourable man judges his slightest moral failings with a severity that the mass of people reserves for acts that are truly criminal. In former times acts of violence against the person were more frequent than they are today because respect for individual dignity was weaker. As it has increased, such crimes have become less frequent, but many acts which offended against that sentiment have been incorporated into the penal code, which did not previously include them.[10]

In order to exhaust all the logically possible hypotheses, it will perhaps be asked why this unanimity should not cover all collective sentiments without exception, and why even the weakest sentiments should not evoke sufficient power to forestall any dissentient voice. The moral conscience of society would be found in its entirety in every individual, endowed with sufficient force to prevent the commission of any act offending against it, whether purely conventional failings or crimes. But such universal and absolute uniformity is utterly impossible, for the immediate physical environment in which each one of us is placed, our hereditary antecedents, the social influences upon which we depend, vary from one individual to another and consequently cause a diversity of consciences. It is impossible for everyone to be alike in this matter, by virtue of the fact that we each have our own organic constitution and occupy different areas in space. This is why, even among lower peoples where individual originality is very little developed, such originality does however exist. Thus, since there cannot be a society in which individuals do not diverge to some extent from the collective type, it is also inevitable that among these deviations some assume a criminal character. What confers upon them this character is not the intrinsic importance of the acts but the importance which the common consciousness ascribes to them. Thus if the latter is stronger and possesses sufficient authority to make these divergences very weak in absolute terms, it will also be more sensitive and exacting. By reacting against the slightest deviations with an energy which it elsewhere employ against those what are more weighty, it endues them with the same gravity and will brand them as criminal.

Thus crime is necessary. It is linked to the basic conditions of social life, but on this very account is useful, for the

conditions to which it is bound are themselves indispensable to the normal evolution of morality and law.

Indeed today we can no longer dispute the fact that not only do law and morality vary from one social type to another, but they even change within the same type if the conditions of collective existence are modified. Yet for these transformations to be made possible, the collective sentiments at the basis of morality should not prove unyielding to change, and consequently should be only moderately intense. If they were too strong, they would no longer be malleable. Any arrangement is indeed an obstacle to a new arrangement; this is even more the case the more deep-seated the original arrangement. The more strongly a structure is articulated, the more it resists modification; this is as true for functional as for anatomical patterns. If there were no crimes, this condition would not be fulfilled, for such a hypothesis presumes that collective sentiments would have attained a degree of intensity unparalleled in history. Nothing is good indefinitely and without limits. The authority which the moral consciousness enjoys must not be excessive, for otherwise no one would dare to attack it and it would petrify too easily into an immutable form. For it to evolve, individual originality must be allowed to manifest itself. But so that the originality of the idealist who dreams of transcending his era may display itself, that of the criminal, which falls short of the age, must also be possible. One does not go without the other.

Nor is this all. Beyond this indirect utility, crime itself may play a useful part in this evolution. Not only does it imply that the way to necessary changes remains open, but in certain cases it also directly prepares for these changes. Where crime exists, collective sentiments are not only in the state of plasticity necessary to assume a new form, but sometimes it even contributes to determining beforehand the shape they will take on. Indeed, how often is it only an anticipation of the morality to come, a progression towards what will be! According to Athenian law, Socrates was a criminal and his condemnation was entirely just. However, his crime – his independence of thought – was useful not only for humanity but for his country. It served to prepare a way for a new morality and a new faith, which the Athenians then needed

because the traditions by which they had hitherto lived no longer corresponded to the conditions of their existence. Socrates's case is not an isolated one, for it recurs periodically in history. The freedom of thought that we at present enjoy could never have been asserted if the rules that forbade it had not been violated before they were solemnly abrogated. However, at the time the violation was a crime, since it was an offence against sentiments still keenly felt in the average consciousness. Yet this crime was useful since it was the prelude to changes which were daily becoming more necessary, Liberal philosophy has had as its precursors heretics of all kinds whom the secular arm rightly punished throughout the Middle Ages and has continued to do so almost up to the present day.

From this viewpoint the fundamental facts of criminology appear to us in an entirely new light. Contrary to current ideas, the criminal no longer appears as an utterly unsociable creature, a sort of parasitic element, a foreign, unassimilable body introduced into the bosom of society.[11] He plays a normal role in social life. For its part, crime must no longer be conceived of as an evil which cannot be circumscribed closely enough. Far from there being cause for congratulation when it drops too noticeably below the normal level, this apparent progress assuredly coincides with and is linked to some social disturbance. Thus the number of crimes of assault never falls so low as it does in time of scarcity.[12] Consequently, at the same time, and as a reaction, the theory of punishment is revised, or rather should be revised. If in fact crime is a sickness, punishment is the cure for it and cannot be conceived of otherwise; thus all the discussion aroused revolves round knowing what punishment should be to fulfil its role as a remedy. But if crime is in no way pathological, the object of punishment cannot be to cure it and its true function must be sought elsewhere.

IV CRIMINALITY AND SOCIAL HEALTH

Gabriel Tarde

In his *Rules of Sociological Method* which appeared in the form of articles in the *Revue philosophique*, M. Durkheim endeavours to build– vainly, I believe – a sort of sociology *in itself* and for itself, which, purged of all psychology, and likewise of all biology, would have a great deal of trouble getting off the ground without the remarkable talent of the builder. Certainly this would be an autonomous sociology, but one which purchased its independence perhaps a trifle dearly – at the price of its reality. I do not claim to criticize this system here; but, since the author has supplied some extremely logically deduced applications of his point of view, we shall apply ourselves to one of these, which particularly struck us, and which will allow us to pass judgement on the principle from which it derives. The question concerns his manner of envisaging criminality. This manner is assuredly novel; it consists in affirming that crime is a completely normal, not in the least morbid, fact of social life; that is to say 'that it is not just an inevitable, though regrettable, phenomenon, due to the incorrigible wickedness of men, but that it is a *factor in public health*, an integral part of every healthy society', even when it is increasing as at present, and when, in fifty years, as in the France we live in, it has almost tripled.

One must concede to the distinguished sociologist that this conceit is far removed from the thoughts of the 'common herd' and he himself doesn't hide from us that, when he was led to this 'surprising' conclusion from his general rule concerning the distinction between the normal and the pathological, he could not help being a little bit 'disconcerted'. But far from seeing here any reason to call in question the absolute truth of the rule in question, he appealed to all his intrepidity as a logician and resolutely embraced this corollary, which seemed to him even to illustrate and confirm the value of his theorem,

Source IV: 'Criminality and social health', *Revue philosophique*, **39** (1895), pp. 148–162. Translated by Andrew Scull.

by showing 'in what new light the most essential phenomena are seen, when they are treated systematically'.

But not as new as one might think. A dozen years ago, I endeavoured to refute an identical or rather very similar paradox of M. Poletti's. This writer, it is true, did not expressly conclude, as M. Durkheim does, that 'crime is necessary, it is bound up with the fundamental conditions of all social life, and, by the same token, it is *useful*'. But he asserted that if, when criminal activity doubled or tripled, industrial and financial prosperity quadrupled or quintupled, this absolute increase in criminality is tantamount to its relative decline, the only thing which matters,[13] and, at the basis of his thought, one sees clearly that, for him too, the present coincidence of these two advances, the advance of evil and the advance of the hard-working, is not accidental and deplorable, but quite inevitable, and betokens the fact that crime and work, crime and genius, derive their vitality from the same sources. Now M. Poletti's idea had no success in his own country or outside it; which does not alter the fact that, in reality, a good portion of the public, of the public scandalized by him and, I think, also by M. Durkheim, is imbued without acknowledging it with some secret belief similar to theirs, and still more dangerous because it is vague and unconscious. These two thinkers have had the merit of expressing with much originality a very banal notion, which finds expression every day in the growing indulgence of judges and juries, in the relaxation of the fibres of indignation and of public disgust when confronted by certain kinds of criminal outrages. If this enervation of penal and social repression was only caused by a growing sense of the complicity of everyone, more or less, in the crime of a particular individual, I would be at a loss to combat it; but it also rests upon the idea, given more credit each day, that contemporary crime is bound up with contemporary civilization like the recto to the verso, that it forms 'an integral part of it'. I am afraid therefore for M. Durkheim lest he finds himself here in agreement with the common or rather vulgar sense so scorned by him. No matter, he has rendered us the great service of obliging us to pose frankly, to confront face to face this fundamental problem: is it true that *from some perspective crime, like misfortune, is good*, and that its

extirpation is no more desirable than possible? Scepticism is allowable here and the need for a rigorous examination, of a sort of scrutiny of the collective *conscience* makes itself felt.

I am well aware that our author does his best to reduce or suppress the practical interest of the question. The necessity and legitimacy of punishment, following him, are in perfect accord with the utility and necessity of crime. 'If it is normal', he says, 'that in every society, there should be crimes, it is no less normal that they should be punished.' But here, I must confess, I no longer recognize the skilfulness of his ordinary dialectic. For in truth the reasons which he urges to justify this identity of opposites would have seemed feeble to Hegel himself. He tells us, in particular, that the sentiments of aversion and 'of detestation' prompted by crime are justified because it is only beneficial in spite of itself. But since when is it permissible to detest even an involuntary benefactor? I grant that we should owe still more recognition to thieves and assassins if they work knowingly and with deliberate purpose to fulfill the noble functions which are ascribed to them, to keep us hygienically in good national health, to provide us with innovative and enterprising characters; but still, if it proved that they render us such signal service even unwillingly, I wonder by what right we may not just inflict a punishment on them, but refuse them an acknowledgement . . . . 'A puerile objection', agreed; yet what does one respond to it? It is not enough to compare punishment to the functions of *excretion* for the living body; and even this comparison is singularly dangerous. From the point of view of the learned professor from Bordeaux, it is rather to the functions of *secretion* that we must compare punishment; for it is the useless or the harmful that is excreted, never the useful, save in the case of grave and serious illness . . . . 'Pain', he adds, 'also has nothing desirable about it; the individual detests it as society detests crime, and yet it is dependent upon normal physiology'. Well, no, the individual is wrong to detest pain in the cases – extremely rare, however, and perhaps even imaginary – where it is really bound up with the production of a great good, and, *if it was proved* that, without a sufficient accompaniment of agonizing pains, the success of a surgical operation or of a confinement would be impossible, it would

be an absurdity to *curb* these sufferings by the use of chloroform. Society thus joins folly to ingratitude in repressing crime if it is partly to this that it owes its inventions and discoveries, and if, thanks to this, besides, as we shall see below, it escapes the danger of severities, of extravagant ferocities. I recall nevertheless that the Egyptians used to detest and sometimes beat the embalmer of corpses, all while judging him eminently useful; but no one, that I know of, thought that they were proved logical in this.

What if, in order to save the argument by cutting it back, it should be alleged that it is perhaps not crime alone, but the coupling of crime and punishment, symmetrically everlasting and universal, which is healthy and socially normal? But it is precisely the unpunished and unprosecuted crime which plays a distinguished and extensive role in history, in the formation and evolution of nations; it is this triumphant crime, buried with royal or dictatorial honours, exalted in statues in the market places, immortalized, of which it might perhaps be permissible to assert, which overwhelming appearances of justification, that this scourge is a spur, this poison a ferment necessary and indispensable to historical progress. Without it, indeed, no more violent annexation of one's neighbour, no more cruel oppression of the lower orders and the conquered, and consequently, for want of conquest and of slavery, no more Roman Empire, no more modern cosmopolitanism and democracy, no more bloody ascent towards Justice and Peace. That is what one might say – mistaking, however, and failing to appreciate the real agents of human improvement who have been not the conquerors but the missionaries, not the ravagers of provinces but the discoverers of truth, the inventors of useful things, the collectors of artistic beauties, the kindlers of ideas perceived somewhere and then radiating everywhere by the force of example and not by the force of arms; – that is what one might say, nevertheless, of glorious crime, of the crime which holds its head high, like the biblical serpent, audacious seducer and corrupter of humanity and likewise of its historians. But with low and rampant crime, that is detested and despised, the only sort that M. Durkheim attends to, how is it possible to judge it to be useful to societies where it steals in like a trespasser, worker in vice, sponger on

labour, a destroyer, like hailstones, of the harvest, and where it produces nothing but the contagion of its evil example? What is it good for except to be pursued by the police, which itself is only good for this sport?

What is it good for? M. Durkheim is going to show us. And, as a matter of fact, one would not easily divine it. Imagine, supposing an impossibility, a society where there is no longer a single murder, a single theft committed, nor the least offence against morality; this could only be the result, he tells us, of an excessive unanimity and intensity of the public *conscience* in the reprobation of these acts; and the deplorable consequence would be that, having become more exacting by the very fact of the satisfactions it has received, this *conscience collective* will begin to indict with an extravagant severity the slightest acts of violence, of unscrupulousness or of immorality; it will be as if one were in a cloister where, in the absence of mortal sins, one is condemned to the hair shirt and to fasting for the most venial of peccadillos. 'For example, unscrupulousness or unscrupulously executed contracts, which only lead to public censure or civil damages, will become criminal offences . . . . If therefore this society is armed with the power to judge and punish, it will style these actions criminal and treat them as such.'

In fact, it does not seem that the danger pointed up by our moralist has a very marked correspondence with reality; and, for the man who is acquainted with the disastrous progress of the most excessive leniency on the part of judges as well as juries, inclined to reduce crimes to misdemeanours, turn criminal into civil cases, and to acquit as many people as possible, for the man who knows this, it is doubtless not the excessive scruples of the easily alarmed public conscience, nor the irresistible tendency towards inordinate penalties for trifles, which is the peril of the hour. I take it for granted that, in such districts where certain thefts are now punished with a 16 franc fine, with the application of the Berenger Act, the same thefts would have merited for their perpetrators, a hundred and fifty years ago, being hanged high and handsome by the executioner of these same towns, in pursuance of the sentence of their court, who, it is true, would have a mass said the next day for the repose of their souls. Between these two

exaggerations, at least, I admit that I still prefer ours, if one absolutely must choose between them. But is it really so clear that, in the situation where we no longer had real offences to punish, we would return little by little to the ancient ferociousness? Rather I believe, and it seems to me more reasonable to think that, having abandoned the practice of punishment, we would likewise no longer take the trouble to punish a plain misdeed committed accidentally in accordance with the law. We would purely and simply banish the exceptional malefactor, as one restricts oneself to expelling from a circle of honest players a cheat caught in the act. Still more would we continue to remain *judicially* indulgent towards ordinary transgressions not prejudicial to society.

It is only the tribunal of *public opinion* which would become rigorous, exacting, hard to please. And where would be the harm in that? The mistake, at all events, would be to suppose that, because there was no more adultery, for example, the salons would be invaded by a ridiculous prudishness, opposed to all freedom of behaviour and conversation in the relations of the two sexes. Far from it, it is in the circles where these relations are the most secure that they are the freest, in America or in England, and, if prudishness of language was ever banished from the earth, it would be in the salon of a loose woman, of compromised reputation, that it would find refuge. The same would hold for the world of business if no swindling, no breach of trust occurred any more; people there would become less and less suspicious, less and less inclined to see fraud in slightly risky speculations. Conversely, in situations where a branch of offence thrusts forward with an alarming rapidity and vigour, it often happens that, instead of continuing to become flabby, honest men's conscience eventually stiffens, reacts with extravagant severity against this criminal infestation; and this is quite the opposite of M. Durkheim's predictions.

Another much more serious error is to think that the production of the criminal varieties of human nature is indissolubly bound up with those of genius; that, consequently, in stamping out crime, one would in the same stroke kill off genius, two kinds of individual originality, equally distant from the 'collective type' which would become in that

manner a rule without exception. In the first place, I have great difficulty in reconciling the author's thought with itself on this point. For him, we shall see presently, there is no other touchstone of normality than its generality; for him, the average type, the collective type, is the normal type; thus everything which departs from it is an anomaly. Consequently, the above proposition of his amounts to saying that criminality is a normal thing because it favours the production of anomalies, and that its suppression would be an anomaly because it would effect the absolute hegemony of the normal state . . . . But let us pass over this contradiction. Is it true, or not, that crime and genius are solidary? There cannot be a more serious moral problem and one which touches on more burning questions. An interdependence of the same sort has also been alleged between madness and genius, but not in the least demonstrated, although it is spurious in a very different way from that linking genius to crime. But in whatever way this latter question is finally resolved by the alienists, it has little importance, when all is said and done, for the moral conscience. It is not so in the former case. It disturbs in the highest degree practical reason, to an even greater extent than another paradox, itself surely highly formidable, which crops up before it when an apologist for war, such as Field Marshal de Moltke, or Dr Lebon recently, claims to demonstrate not only that it is not possible but also that it is not desirable to do away with warfare, that warfare, too, 'is an integral part of social health', and that, without its periodic ration of massacres, lootings, bellicose abominations, humanity would fall to pieces. Yet pass over this efficacy of warfare, after all, it is homicide and theft by mutual consent. But if *unilateral* homicide and theft, and rape into the bargain, are also useful, useful to the free flight of the inventive spirit, and if the theory *of block* is applicable here too, as it has indeed been invoked to absolve the September massacres, inseparable, it has been said, from the revolutionary glories, then what, I ask you, remains of the old distinction between good and evil?

If, to resolve this question, one relies upon statistics, as a source of essentially 'objective' information, one deceives oneself. The oracles of this Sybil are often ambiguous and in need of interpretation. Maps, for example, show us clearly

that the richest the most civilized, the most literate Departments, are generally (not always) the most productive of crime just as of cases of madness. Her graphs and her tables too seem at times to testify to the same effect. But there are some significant exceptions: the case of Geneva, where criminality, according to M. Cuénoud's monograph, diminishes in proportion as it becomes civilized; the case of *London*, more remarkable still, where the crime rate is half as great as in the provincial towns and lower even, extraordinarily, than that of the English countryside. I borrow this curious detail from a recent study by M. Joly, where it is demonstrated, moreover, that, for ten years, crime in England, in all its forms, especially among the young, has diminished 10 to 12 per cent. Poor England! It is in the process of becoming very sick! If the truth must be told, the official statistics are still compiled too imperfectly and for too short a time to supply the decisive data in the debate which occupies us. They do not allow us to decide whether the rise of criminality almost everywhere at the moment is owing to the lasting and essential energies of our civilization and not just to its accidental and transitory vices, to the insufficiency of its moral effort compared with its industrial and scientific effort.

I would have more confidence in special, circumscribed statistics, gathered by private individuals to examine closely the causes of crime and separately the causes of genius. Researches of the first sort are familiar to criminologists; now, every time one of them has taken it into his head to inquire into the heredity antecedents and mode of education of 100 randomly selected criminals, he has met with a great deal more debauchery and idleness, alcoholism and madness, and ignorance too, than among the ancestors and educators of 100 honest people belonging to the same races and the same classes; but more genius? Not that I know of. On the other hand, M. de Candolle has at great length, patiently and ingeniously researched into what familial and social environment was most conducive to the appearance of genius, especially of scientific genius; and he found that, among these favourable influences, must be reckoned of first importance an essentially moral home life, free of all criminal taint and of all vice, hereditarily attached to traditional honesty. In short, it is

the *minimum* or rather the absence of criminality which appeared to him to be tied to the *maximum* of scientific genius. It follows from this that there is not the least connection between the causes of crime and the causes of genius; and they might with impunity have been placed side by side for centuries, they would remain no less strange and hostile to each other. This link which one would like to establish between them, let us note, appears the more untenable in proportion as, through the improvements from the repetition of the offence, contemporary European criminality becomes more professional – a profession which, assuredly, is of no use to others – and settles still more in decaying, anti-social surroundings, unfit for all healthy work.

And, indeed, let's consider a little. How, I ask you, would the greater security procured for life and property by the complete suppression of murderers and thieves, be of a sort to hinder the inspired work of inventors? How would the elimination of all spirit of extortion, of shady speculation, in journalism and finance, form an obstacle to the independence, to the power, to the free diversity of the Press, to the birth and success of viable and fruitful industrial enterprises? To be sure, in this case, we should not have seen constituted, with the *success* we all know about, the Panama Canal Company; but, on the other hand, without *Panamanianism* and its catastrophe, how many useful and prosperous companies would have been founded which did not dare to be born in the aftermath of the discredit cast over both good and bad concerns! Beyond the direct harm, indeed, which crime produces, we must attribute to it, not just this indirect and visible evil of prisons to construct and maintain, of the criminal justice system to operate, but also, and above all, many other indirect evils which one doesn't see: in the first place, the evil of public insecurity, the evil of the mistrust which gets in the way of utilizing the things or persons whom one mistrusts, the time and money lost in providing oneself by means of revolvers, locks and safes, against the contingency of murders and thefts, or against the possibility of immoral acts by an excessive and awkward reserve in the relations of the two sexes; then, the evil of the example, the perversion of public spirit especially by the anarchist explosions, the decline

of the respect owed to human life and the diminution of the rigid probity among honest men become a little less honest following the reading of the court reports because, compared to these monstrous misdeeds, their own transgressions take on the colour of innocent peccadilloes.

Imagine, once more, a State purged of all its families of malefactors, of all its vagabonds, of all its neophytes and seminarians of crime. We may not say that it is impossible, for one might have said the same thing of slavery in antiquity, and even now of pauperism, of begging in the streets. We may not say either that for this to happen there would have to be a complete levelling of spirits and of feelings united in a 'collective sentiment' far more intense and far more unanimous than at present, so that individual originality would be left mortally wounded. A radical and energetic reform of our judicial and prison system would, I believe, be sufficient. Be that as it may, however, let us note that crime is the violation not of all the rules but only of the most basic and least debatable rules of morality. From the fact that everyone agreed to stigmatize forcibly and to punish severely these violations, it would in no sense follow that the rich efflorescence of individual diversity would be cut down or pruned back, nor even that the freedom of theoretically thinking anything at all would be diminished. It is possible, as a matter of fact, that, in what concerns the freedom of conduct, the public conscience might become more exacting, the sense of justice would perhaps develop to the extent that the boldest social reforms would be enacted without bloodshed, under the pressure of the generalized morality. Without doubt, for want of crimes of passion, our literature would lose some of its most common inspirations; without habitual drunkenness, equally, the drinking song would never have been. By way of compensation, we have no idea of all the kinds of artistic and literary beauty of which our crimes and offences, our immoralities and our vices, deprive us; we do not dream of these delicate flora, of these new forms of art, purer and more exquisite, which our taste would not fail to create for itself to delight in instead of and in place of our gamy tastes.

It may be objected that I am right but yet wrong to be so insistent. I don't believe it. It is useful to refute a paradox

which is only the lively expression of muted and unavowed, even disavowed, common sense prejudice; common sense confined in this manner is forced into enormous mistakes, born of confused ideas, of which it has no consciousness, which horrify it when it is shown them, but which it sets in motion. It is more interesting, nevertheless, to ask ourselves how a sociologist like M. Durkheim could be led to the proposition which I am combating. By the most logical path in the world, by his way of conceiving the distinction between the normal and the pathological in the social world. Even in the biological sphere, the definition of illness and health is a difficult task, and our scholar has devoted the most interesting pages of his book to dealing with this nice question. He shows, or believes he shows, that the distinctive characteristic of the morbid state consists neither in the pain which accompanies it, and which also sometimes accompanies the healty state, nor in the shortening of life, for it is illnesses compatible with longevity and it is normal organic functions, such as childbirth, which are often fatal – nor finally in contrast to a certain specific or social ideal which one dreams up, for this final hypothesis is completely subjective and, therefore, not in the least *scientific*. Having eliminated all these characters, only one remains, and that completely objective: the normal is the general. 'We shall call normal those facts which are the most generally found and we shall call the others morbid or pathological ; *the normal type is identical with the average type* and every deviation with respect to this standard of health is a morbid phenomenon.' Now, a society without a certain regular quota of crimes has never been seen, anywhere; thus, since nothing is more general, nothing is more normal.

This principle is already quite punctured by this conclusion; and there are other equally strange ones. All individuals are defective, imperfect in some respect; thus, nothing is more normal than imperfecton and defectiveness. All animals are sick at some time or another, if only with the disorder from which they die; thus nothing is more normal than illness . . . . In a few lines, Cournot dealt justly with the error of confounding the normal with the average type. Imagine a small tribe, or a species of animal, and there are some, where the average lifespan is less than the age of adulthood, it would

follow that in the situation where everyone truly conformed, in the length of their existence, to this average type, and did not present any anomaly in this respect, that none of them would reproduce, and that this would be normal, Take the average level of intelligence, the average level of schooling, the average level of morality in a crowd. To what level normality is going to be reduced! At the beginning of this century, the average schooling used to consist in not knowing how to read or write. Superior culture is still an anomaly, since it is what is less general and less widespread. To be sure, on this account, ignorance and immorality are healthier and more normal things than knowledge and virtue.

M. Durkheim, in studying this subject, has omitted some necessary distinctions. He says there are healthy forms of pain; so there are, in the sense that they are useful physiologically, useful to the accomplishment of a vital function, that of the generation or repair of tissue. But physiologically they are themselves deleterious, when they do not serve to prevent greater suffering on the part of the individual. Consequently, psychological and social effort strains increasingly to reduce them, often to do away with them, to render them less and less necessary and beneficent, thanks to inventions such as the use of chloroform or of morphine. What is normal for the species may be pathological for the individual. Parturition, when it kills the individual or shortens her life, is an evil and an illness for her, but a good for the species which, but for this mortal accident, might itself die.

I wonder that M. Durkheim has not born in mind here the famous struggle for existence. Could the pathological not be defined as what diminishes the chances of the triumph of the individual – or those of the species, let us keep the distinction well in view – in this great struggle of the living? But, from this point of view, pain appears as an evil and an anomaly which, if prolonged, would fatally entail the defeat of the individual or for that matter the species. There are illnesses with which one may live *hors du combat*, but none which allow triumph in it. From this point of view, too, the utility is evident of a notion rejected too cavalierly by our author: that of adaptation. One may, indeed, define as normal that which is adapted to triumph in the struggle. Let us add that by

considering *cooperation to stay alive*, as well as conflict, one readily obtains an acceptable definition: isn't the abnormal that which renders an individual unfit or less fit to enter into an association and to strengthen the ties in it?

Pasteur's theory of the origin of the most serious, the most dangerous illnesses, those most worthy of the name, gives rise to a conception of illness which might be considered as derived from a singular and original instance of the *struggle for life*, concerning which M. Durkheim says nothing either: illness, if this microbial explanation is generalized, presents itself to us as the combat between an army of cells and an army of microbes, a combat in which our organism is at one and the same time the stake and the field of battle. These two armies are composed, separately, of combatants in good health right up to the moment when they are exterminated, but it is their contact which is morbid. Nothing applies better to criminality than this notion of illness. Criminality is a conflict between the great legion of honest men and the small battalion of criminals, and the latter like the former act *normally*, given the goal which each pursues. But as the two goals are opposed, the resistance they mutually offer each other is experienced by each of them as a pathological state which, though permanent and universal, is no less distressing for all that.

M. Durkheim's prejudice against the idea of finality, *even in social science*, prevents him from discerning the truth, amidst the rather artificial obscurities of the question he poses. How can one develop an idea, however limited, of the normal and the abnormal, if one persists in proscribing what must come first and foremost here, considerations of a teleological and also of a logical sort; that is to say if one does not consider, above all, as abnormal or morbid whatever disturbs the systematic harmony of the being, or the organic constitution, the mental or social constitution – whatever prevents the harmony of goals and the harmony of judgements from being sufficient to realize their ruling purpose? So true is this that, despite a contempt for finalism which goes so far as to make him reject even the idea of utility, the distinguished professor has himself made use of it without meaning to. He has grasped that it will not do to define the normal as the general, unless one goes back to the causes of the latter, to allow of

distinguishing between generality of various sorts, accepting some of them, rejecting others, and not accepting certain rather awkward consequences of his own principle. So he has looked for these causes and believes he has found them in what he terms 'the conditions of existence'. When the conditions of existence of a society chance to change, what was normal until then – for example, the religious practices, or the individual character of ownership – becomes abnormal, in spite of its persistent generality. And that is how our author, in a note, a few pages after writing that the growth of criminality in our epoch is a normal thing, could write that the decline in religious sentiment is also something normal, such that the revival of this sentiment, still the most universal of social manifestations, would be an anomaly whereas the growth of our crime rate is not! Our present economic state, he goes on to say, 'with the absence of organization that is characteristic of it' is indeed universal, but it is none the less morbid if it is proved that it is bound up 'with the old segmentary social structure' and not with the new structure which tends to take its place. Yet what are these 'conditions of existence'? M. Durkheim does not specify: let us do so. These are the ideas or the beliefs which have spread, the rights or the duties which men have assumed, or else the new goals, or rather simultaneously the new goals and the new ideas, which they have set about pursuing. The idea of finality is thus implied in that which M. Durkheim believes takes its place.

Without any doubt, 'what is normal for a mollusc is not so for a vertebrate' and each species has its own normality; but why so? Because one irresistibly ascribes to each species a fundamental necessity (to swim, to fly, etc.), a Desire, a true Purpose, the major and necessary premise of the implicit syllogism from which we deduce the conclusion 'this must be, this is normal; this ought not to be, this is abnormal'. Even better, for each individual, pursuing the goal that we know he has or suppose he has, the conditions of normality change. 'The savage', we are told, 'who possessed the reduced digestive organs and developed nervous system of the healthy civilized man would be a sick man in relation to his environment.' *Socially* a sick man, granted, for he would be constituted in opposition to the needs and wishes of the tribe;

but not individually sick if his own ideal, contrary to that of his surroundings, called for this cerebral development and this reduction in the vegetative life.

Writing these lines brings to mind a thought of [John] Stuart Mill's which is far removed from Durkheim's. The normal state, he said somewhere, is, for every individual, the highest state he can attain. Put another way: the normal is the ideal; and the morbid is most often the general, the common, the 'vulgar', this vulgar which our author scorns so deeply but which he has no right to scorn if he wants to remain faithful to his own principle. The normal, then, for a society, is peace in justice and light, the complete extermination of crime, vice, ignorance, poverty, corruption. And I am well aware that the danger of this definition is of inclining too much towards a chimera, but I still prefer it to the other, however 'scientific' it flatters itself as being.

Why so? Because I cannot admit, with my subtle contradictor, and it is not my least disagreement with him, that science, or what he calls science, cold product of abstract reason, alien, by hypothesis to every inspiration of the conscience and heart, has the supreme authority over conduct which it legitimately exercises over thought. Where did the Stoics learn the abnormal character of slavery, despite its generality, its universality, in their time? Not in listening to the geometers, not to the astronomers, nor to the physicians of those days, but to their heart. Silence the heart, and slavery is justifiable for them, as it was for Aristotle. I would add that it is the *whole* man who must think, with his heart, with his soul, even with his imagination, and not just with his reason. He must often, doubtless, muffle the first strings to allow freer play to the vibrations of the latter, to the oscillations and operations of his intelligence. It is like holding one's breath, for a few moments, so as not to muddy the surface of the pure water in which one seeks to see the reflection of its banks; and reason is this pure water. But the same happens with this *subjective abstraction*, as it were, applied to our own internal reality, as with the objective abstraction to which the external realities are artificially subjected in order to arrive at a better understanding of them by analysing them successively under their diverse aspects. The latter ought no more to be prolonged

indefinitely than the former, and ought not to be taken for anything but a heuristic device, a temporarily useful fiction. From time to time, the most abstract thinker, the deepest diver – especially the deepest – in order to avoid drowning, must recapture himself as a whole, come up to the light to breathe freely; and it is in these moments of relaxation of the heart, of imaginative intoxication, following a calm reflection, that it is sometimes given to him to see a little more clearly into the intimacy of things, which have also been recaptured in the plenitude of their existence – a plenitude temporarily fragmented by the analysis.

M. Durkheim believes he is honouring science in ascribing to it the power of sovereignly directing the will, i.e., not just of *pointing out* to it the most appropriate means of reaching its dominant goal, but also of *commanding* its orientation towards this pole star of conduct. Now, it is certain that science exercises an influence over our desires, but principally a negative influence: it shows the unrealizable or contradictory character of many of them and in so doing tends to weaken, if not eliminate them; but, among those which it may judge realizable in equal or even in different degrees, by what right might it forbid us to experience some and enjoin us to experience others? It only has absolute power over our intellect; and even then it only imposes its teaching on it on the basis of first-hand evidence, or of sensory data, which it has not created and which it solicits. With greater reasons, when it applies to the will, of which it is only so to speak the private counsel, it can only command or commend this or that line of conduct on the basis of given preferences, the major premises of the moral syllogism of which it is only the minor premise and the conclusion. If it has to deal with an ambitious person, why should it prescribe love for him? If it has to deal with a lover, why should it prescribe ambition for him? Why should it ordain even for the scholar his passionate thirst for truth rather than for riches or honours? We are born, as individuals or peoples, with a particular power of projection like stars, with an impulse of our own which comes from the heart, from the sub-scientific, sub-intellectual depths of our soul; this is the necessary foundation of all the (always conditional) counsel which it can offer us. And when it is a

question of modifying wether the intensity, or the direction of this internal energy, it is no law of physics or physiology, or even of sociology, which has this power, but rather the individual or national encounter, in some byway of life or history, with a new object of love or hatred, of adoration or execration which, from the stirred-up depths of our heart, draws forth new energy.

It is in demanding more from science than it can give, in ascribing to it rights which exceed its compass, already vast enough, that one gives rise to the belief in its alleged *bankruptcy*. Science has never failed to keep its genuine promises, but a crowd of false promissory notes bearing its forged signature have circulated, and these it finds it impossible to honour. It is vain to add to their number.

V DURKHEIM'S REPLY TO TARDE

I beg leave to respond briefly to M. Tarde's recent article entitled 'Criminality and Social Health': for most of the propositions which my eminent critic attributes to me are not mine. I judge them false just like him.

1. I did not say that the rise in criminality, documented by our statistics, was normal. One will not find a sentence in my book in which this idea is expressed. I agree so little with M. Poletti's theory that I publicly refuted it in a lecture of the course on the sociology of crime which I recently taught at Bordeaux. In the book I am preparing on *Suicide*, one will find a refutation of the same thesis, in so far as it is applicable to suicides. So a first point is established. After this declaration, M. Tarde cannot doubt that on this question he has attributed to me a position which is not mine.

In any case, M. Tarde seems to have had some doubts himself: for he felt the need of adding to his text a note to demonstrate that this proposition is 'consistent with my principles'. This method of debate, which consists of making

Source V: Durkheim, E. 'Crime and Social Health', *Revue philosophique*, **39** (1895), pp. 518–23. Translated by Andrew Scull.

an author say what he did not say, was once in high regard; it has since been abandoned. It was realized that it was too easy to draw from a system all the inferences one liked. I think it would be just as well not to reopen the question. But at all events, is it true that, as a matter of logic, I must accept this mistake? You decide. Having established that the existence of criminality was a universal fact, and, in consequence, fulfilled the criterion of normality, I felt obliged to raise an objection. If, I said, the facts allowed us at least to believe that, the further one advances in history, the more criminality, without disappearing, approaches zero, one might suppose that this universality and, therefore, this normality are temporary. But it so happens that the only information which we possess shows us an increase instead of a decrease. We must consequently reject the hypothesis, seeing that it is without foundation in fact. But though this rising tide of crimes does not allow us to admit that they are diminishing, it does not follow that this is normal. The question remains untouched upon and it allows of many solutions. For we are not caught on the horns of the dilemma M. Tarde devises. It may be that, in fact, it is normal that some offences rise along with civilization, but that the enormous growth which has come about in our time is pathological. Finally, I am so far from ignoring what is happening that, thinking about the sad spectacle which our statistics presently furnish us with, I wrote on the same page on which the offending passage is found: 'It may be that crime itself has abnormal forms; this happens when, for example, *it attains an exaggerated level. There is no doubt, as a matter of fact, that this excess is of a morbid nature.*

2. I did not say that the utility of crime consisted in preventing the moral *conscience* from indicting too harshly triflingly dishonest actions, as if these were a serious evil and must be suppressed at all costs. I do not see a single word of my book which could justify such an interpretation. I simply said that, *in fact*, if the moral *conscience* were to become strong enough so that all crimes, hitherto kept in check, disappeared completely, one would see it denounce more severely acts which it previously would have judged more leniently; and that, in consequence, criminality, having disappeared under

one form, would reappear under another. Hence it follows that there is a contradiction in conceiving of a crime-free society. But I did not say that this greater severity in the way of assessing moral actions would be an evil any more than I said it would be a blessing. And if I did not ask myself the question, it is because it cannot be posed in this abstract manner. One would also need to know in what social type it occurs in order to decide whether this recrudescence of rigour is desirable or not. In the primitive Roman City-State, where social life was only possible if the individual personality was, in great measure, absorbed in the collective personality, it would have been injurious had the moral *conscience* become too sensitive to offences directed against individuals. But today, if the sentiment of deference and respect which we feel for the great contemporary religions and which still possess some juridical support in most European codes, were to pass a certain degree of intensity, we would see what would become of our freedom of thought. I only give these examples to show that the question is not so simple.

3. I did not say that, if certain crimes became rarer, the punishments imposed on them would necessarily intensify. From the fact that they would be prosecuted more strictly it does not follow that they would be punished more strictly. I spoke of prosecution, not of repression. These are two separate problems which M. Tarde seems to confound. What ensures that these two orders of facts do not vary one with the other, is that, very often, the collective sentiment which the crime offends is equally offended by the punishment. Thus a sort of balance is established which prevents the punishment from increasing along with the intensity of the blame. It is this which comes into being for all crimes which give offence to the sentiments of sympathy which we feel for mankind in general. As this sympathy becomes more lively with civilization, we become more sensitive to the least outrages which the human person can suffer. Consequently, slight offences, which, not long ago, were treated indulgently, now seem scandalous to us and are punished. But, from another point of view, all repression does equal violence to this same tendency, which, in consequence, stands in the way of the punishment becom-

ing more severe. We have more compassion for the victim, but we also have more compassion for the offender. Even, for a time, it turns out, for reasons which we cannot go into here, that the offender benefits more from this transformation than the victim. This is why, *as far as this particular kind of criminality is concerned*, punishment lessens in proportion as the moral *conscience* becomes, on this same issue, more exacting.

4. I nowhere said that crime and genius were only two different aspects of the same mental state. All this part of M. Tarde's discussion is over my head. I said that it was useful and even necessary that, in every society, the collective personality did not repeat itself identically in all the individual *consciences*; among the differences which arise in this way, there are some which make the criminal, others, the man of genius, but I have never identified the second with the first. It can happen that the criminal is a genius, as he can be below average. In any case, the reasons for which I said that crime is normal, at a certain level, are independent of the intellectual aptitudes that one attributes to the offender.

5. It is particularly incorrect to say that 'low and rampant crime that is detested and despised, is the only sort that M. Durkheim attends to'. When I tried to show how crime could even have a direct utility, the only examples which I cited were those of Socrates and the heretical philosophers of all periods, precursors of free thought; and we know they were numerous. It is on these facts and their analogues – and these are themselves legion – that it would have been necessary to bring the discussion to bear in order that it might deal with my thesis.

Facing propositions which have been incorrectly attributed to me, I want to recall briefly those I really wanted to establish; the reader will determine whether there has been a reply.

First, I said that, *useful or not*, crime in any case is normal because it is linked to the fundamental conditions of all social life; such is the case because there cannot be a society where

individuals do not diverge more or less from the collective type and because, among these divergencies, there are no less inevitably some which exhibit a criminal character. A substantially complete levelling is physically impossible. I see nothing in M. Tarde's article which responds to this argument, except the following sentence: 'One should not say that it is impossible [referring to the disappearance of all criminality], for one might have said the same thing about slavery in antiquity, and even now of pauperism, or of begging in the streets.' I cannot see the connection between the disappearance of crime and of slavery, slavery not being a crime. As for pauperism, we are scarcely in a position to know if it is destined to disappear. A wish is not a fact. And besides, on this point too, what is the connection with criminality?

I went on to say that the existence of criminality had a *generally indirect* and *sometimes direct* usefulness; indirect, because crime could only cease to exist if the *conscience collective* dominated individual *consciences* with such an ineluctable authority that all moral change would be rendered impossible; direct, in that occasionally, *but only occasionally*, the criminal has been the harbinger of a morality to come.

To destroy the first part of this proposition it would have been necessary either to prove that a fixed arrangement does not rule out, or at least make very difficult, subsequent rearrangements and that, in consequence, a morality so powerfully organized and deep-seated might yet evolve further, or else to deny that there has been and must always be moral evolution. Instead of this, M. Tarde is satisfied with enumerating the untoward consequences of theft, rape, murder, extortion. Do I need to say that I am aware of these and that I would not dream of disputing them? I did not say that crime did no harm; I said that it had a useful effect which I have just recalled. The harmful effects it may have do not show that it may not have this useful one. You will ask how it can be normal, if it is in some respect injurious? But I have precisely applied myself to establishing that it was a mistake to believe that a normal fact is entirely advantageous; there is nothing which is not injurious from some viewpoint. More than that, we must recall that the social harm caused by crime is counterbalanced by punishment and that, in accordance

with M. Tarde's happy phrase which I beg leave to make use of because it catches my meaning very nicely, what is normal is the inseparable pairing of crime and punishment.

To destroy the second part of my thesis it would have been necessary to prove that one could introduce changes in morality without becoming, almost inevitably, a criminal. How then is morality to change if no one deviates from it? You say that one could add new maxims without eliminating old ones? The solution would be purely verbal. The rules which one adds on necessarily drive out others. A moral code is not a mathematical scale which can increase or decrease without changing its nature; it is an organic system in which the parts are interdependent and the least change introduced into it upsets the whole organism. At all times, the great moral reformers have condemned the reigning morality and have been condemned by it.

Finally, in this discussion, it would have been necessary not to fix one's eyes exclusively on the present forms of criminality, for the feelings they arouse in all of us scarcely allow us to speak of them objectively. More than that, one cannot judge the role and the nature of crime in general on the basis of such particular examples. Let us look at the past, and the normality of crime is no longer paradoxical; for, in looking at mankind's earlier morality, we appreciate better how important it was that it was not fixed too strongly to allow of change. Granting this, in order to deny that this necessity applies equally to our present morality, one would have to allow that the era of changing morality is over. Who would ever dare to say of any one of the forms of the future that it could go no further?

In the third place, morality is a social function; it must, therefore, like any function, have only a limited degree of vitality. This is the price of organic equilibrium. If morality appropriates to itself more than its share of the vital force, other forms of collective activity will suffer. If our respect for human life were to surpass a certain intensity, we would not put up with even the idea of war; and yet in the present state of international relations, we must have the capacity to wage war. Nothing is more moral than respect for individual dignity, and yet, past a certain point, it renders military discipline, which is indispensable, and indeed all discipline, impossible. Too

much pity for the suffering of animals, in opposing the practice of vivisectionism, becomes an obstacle to the progress of science, etc., etc. The maxim *ne quid nimis* is true of morality and its authority. But if this authority has its limits, it is inevitable that, in certain cases, it should be dominated by disregarded contrary forces, and, inversely, it must be disregarded now and then in order not to be lured outside its natural limits.

Finally, if I have said of crime that it was normal, it was by the application of a general rule which I have tried to establish for distinguishing the normal from the abnormal. The discussion of this rule should perhaps have been the foundation of the debate, for, it being granted, the rest follows. M. Tarde only touches on the question very briefly. He makes two objections.

(1) The normal type, he claims, cannot be confounded with the average type; for, as everyone is more or less ill, illness would then be normal. I reply: If everyone is ill, each has a different illness; these individual characteristics therefore cancel each other out in respect of the generic type, which bears no trace of them. Might it be said that one must find, if not a specific illness, at least a general liability to illness? I accept this; but let us not be taken in by mere words. In what does this liability consist? Quite simply in the fact that the average individual, like everyone, only has a limited power of resistance which, in consequence, is perpetually laid open to being conquered by antagonistic, but more powerful, forces. What is contradictory about the fact that the state of health implies only a limited vital energy? I see it as no more than a truism.

(2) In the second place, M. Tarde objects, a society in which there were only average men from the physical, intellectual, and moral points of view, would be on such an inferior level that it could not survive; how can one grant that it is healthy? What a strange muddle my ingenious adversary has perpetrated here!

In the theory which I formulated, a society which only

included average individuals would be essentially abnormal. For there is no society which does not include multitudes of individual anomalies, and so universal an occurrence is not accidental. *It is thus socially normal that there should be in every society some psychologically abnormal individuals*; and the normality of crime is only a particular instance of this general proposition. Indeed, as I expressly observed in my book [*Les Regles* p. 83], the conditions of individual health and those of social health may be very different and even contrary to one another. This can be granted without difficulty, if one recognizes with me that there is a deep dividing line between the social and the psychic. But by the same token, outside any system, the facts directly substantiate this antithesis. A society can only survive if it is periodically renewed; that is to say, if the old generations give way to others; so the former must die. Thus the normal state of societies implies the sickness of individuals; a certain death rate, like a certain crime rate, is indispensable to collective health.

At all events, as M. Tarde said in summing up, the origin of our disagreement lies elsewhere. It springs above all from the fact that I believe in science and M. Tarde does not. For it is beyond all belief to reduce it to being nothing more than an intellectual amusement, at best capable of showing us what is possible and impossible, but incapable of use for the positive regulation of conduct. If it has no other practical utility, it is not worth the trouble it costs. If he expects in this way to disarm its recent adversaries, he is sadly mistaken; in reality, he surrenders his weapons to them. Unquestionably, this sort of science will no longer fall short of men's expectations; because men will no longer expect much from it. It will no longer be exposed to being accused of bankruptcy; because it will have been found of minor value and of no great use in perpetuity. I do not see what science gains and what we gain here. For sensation, instinct, passion, all the base and obscure parts are thus placed above reason. We made use of these when we could not do otherwise, having nothing better. But when they are seen as something other than a makeshift approach which must little by little give way to science, when they are granted any pre-eminence whatever, then even if one does not openly refer to a revealed faith, one is theoretically a

more or less consistent mystic. And mysticism is the rule of anarchy in the practical order, because it is the reign of fantasy in the intellectual order.

NOTES

1 For example, the knife used to commit a murder.
2 Moreover, this is recognized even by those who find the idea of expiation incomprehensible. Their conclusion is that, to be congruent with their doctrine, the traditional conception of punishment should be utterly transformed, and reformed from top to bottom. This is because the conception rests, as it has always done, on the principle that they oppose.
3 Among the Jews theft, violation of trusteeship, abuse of confidence, were treated as private offences.
4 In Judea the judges were not priests, but every judge was the representative of God, the man of God. In India it was the king who passed judgement, but this function was regarded as essentially religious.
5 However, what accentuated the penal character of the private offence was that it entailed infamy, a real public punishment.
6 In any case it is important to note that the *vendetta* is a matter which is eminently of a collective nature. It is not the individual who takes revenge, but his clan; later it is the clan or family which is paid restitution.
7 A man found gathering wood on the Sabbath day: 'Those who had caught him in the act brought him to Moses and Aaron and all the community, and they kept him in custody, *because it was not clearly known what was to be done with him.*' (NEB: Numbers 15.32–4). Elsewhere the case concerns a man who had taken God's name in vain. Those present arrested him but did not know how he should be dealt with. Moses himself did not know, and went away to consult God's will (NEB: Leviticus, 24.12–16).
8 In saying that punishment, as it is, has a reason for its existence, we do not mean that it is perfect and cannot be improved upon. On the contrary, it is only too plain that, since it is produced by purely mechanical causes, it can only be very imperfectly attuned to its role. The justification for it can only be a rough and ready one.
9 From the fact that crime is a phenomenon of normal sociology it does not follow that the criminal is a person normally constituted from the biological and psychological viewpoints. The two questions are independent of each other. This independence will be better understood when we have shown later the difference which exists between psychical and sociological facts.
10 Calumny, insults, slander, deception, etc.

11 We have ourselves committed the error of speaking of the criminal in this way through not having applied our rule (cf. *Division du travail social*, pp. 395–396).

12 But, although crime is a fact of normal sociology, it does not follow that we should not abhor it. Pain has likewise nothing desirable about it: the individual detests it just as society detests crime, and yet it is a normal physiological function. Not only does it necessarily derive from the very constitution of every living creature, but it plays a useful and irreplaceable role in life. Thus it would be a peculiar distortion to represent our thinking as an apologia for crime. We would not even have envisaged protesting against such an interpretation were we not aware of the strange accusations and misunderstandings to which one is exposed in undertaking to study moral facts objectively and to speak of them in language that is not commonly used.

13 There are, biologically as well as socially, salutary evils which prevent still greater evils: this is the case with old age, menstruation, taxes, etc. For it is better to age than to die, and to pay taxes rather than not be protected by the police. It is also the case with vaccination, a small illness which avoids a larger one, the smallpox. [Tarde]

CHAPTER 4

The Evolution of Punishment

In the present state of the social sciences, one can, in most cases, only render the most general aspects of social life intelligible. Undoubtedly this leads one now and then to what are merely gross approximations, but these are not without their usefulness; for they are a preliminary means of coming to grips with reality and, however schematic they may be, they form the essential precondition of subsequent more precise formulation.

Keeping this proviso in mind, we shall seek to establish and to explain two laws which seem to us to prevail in the evolution of the apparatus of punishment. It is quite clear that we shall direct our attention only to the most general tendencies; but if we succeed in introducing a little order into this confused mass of facts, however imperfect it may be, our labours will not have been in vain.

The variations through which punishment has passed in the course of history are of two sorts, quantitative and qualitative. The laws governing each of these are, of course, different.

I THE LAW OF QUANTITATIVE CHANGE

This may be formulated as follows:

The intensity of punishment is the greater the more closely societies approximate to a less developed type – and the more the central power assumes an absolute character.

Source: Durkheim, E. 'Two Laws of Penal Evolution', *Année Sociologique*, **4** (1901) pp. 65–95. This translation, by T. Anthony Jones and Andrew Scull, first appeared in *Economy and Society* 2 (3), (August 1973). It is reproduced here in slightly amended form.

Let us first explain the meaning of these propositions. The first of them does not really need much further definition. It is relatively easy to determine whether one social type is more or less advanced than another: one has only to see whether they are more or less complex and, as to the extent of similar composition, whether they are more or less organized. This hierarchy of social types, moreover, does not imply that the succession of societies takes a unilinear form; to the contrary, it is certain that the sequence must rather be thought of as a tree with many branches all diverging in greater or lesser degree. But, on this tree societies are found at differing heights, and are found at differing distances from the common trunk.[1] It is on condition that one looks at in this way that one can talk in terms of a general evolution of societies.

The second factor which we have distinguished must concern us at more length. We say that governmental power is absolute when it encounters among the other social functions nothing which serves to counterbalance it and to limit it effectively. In reality, the complete absence of all such limitations is nowhere to be found: one might even say that it is inconceivable. Traditions and religious beliefs act as brakes on even the strongest governments. Beyond this, there are always certain lesser social institutions which now and then are capable of making themselves felt and resisting governmental power. The subordinate elements which are subjected to a supreme regulatory function are never deprived of all their individual energy. But this factual limitation may be in no sense legally required of the government which submits to it; although it exercises a certain amount of care in the exercise of its prerogatives, it is not held back by written or by customary law. In such a case, it exercises a power which we may term absolute. Undoubtedly, if it goes too far, the social forces which it is harming may unite to react to this and to contain it; it may even be that the government, foreseeing that such a reaction may arise, and in order to forestall it, may impose restrictions on itself. But this development, whether it is the result of the government's own actions or is imposed on it, is essentially contingent; it does not arise out of the normal functioning of institutions. When it arises out of the government's initiative, it is presented as a gracious concession, as a

voluntary relinquishment of legitimate rights; when it is produced by a collective resistance, it has a frankly revolutionary character.

One can characterize an absolute government in yet another way. The legal sphere is entirely centred around two poles; either the relations which are central to it are unilateral, or they are, on the contrary, bilateral and reciprocal. These are, at least, two ideal types [*types idéaux*] around which they oscillate. The first consists exclusively of rights given to one of the parties to the agreement over the other without the latter enjoying any rights corresponding to his duties. In those of the second type, on the other hand, the legal bond provides for complete reciprocity in the rights conferred on both parties to the agreement. Real rights and more particularly the right of property, represent the purest form of the first type: the owner has rights over his property, which has none over him. The contract, and above all the just contract, i.e., one where there is an exact equivalence in the social value of the objects or benefits exchanged, exemplifies the case of reciprocal connections. Now, the more the relations of the supreme power with the rest of the society have a unilateral character, in other words the more these relationships resemble those which unite the possessor and the thing possessed, the more absolute is the government. Conversely, the more completely bilateral are its relations with other social groups, the less absolute it is. Thus, the purest example of absolute supremacy is the Roman *patria potestas*, as the old civil code defines it, since the son was likened to an object.

Therefore, what makes the central authority more or less absolute in character, is the degree to which all counterweights organized with a view to restraining it are missing. One can therefore foresee that this kind of power structure comes into being when all the directive functions of society are more or less completely brought together into one and the same hand. In fact, because of their vital significance, they cannot be concentrated in one and the same person, without giving him an extraordinary hold over the rest of society, and this dominance is what is meant by the term absolutism. The person who wields such an authority finds himself possessed of a power which frees him from any collective restraint, and

which to some extent means that he only takes into account himself and his own whims and can impose all his wishes. This hypercentralization releases a social force *sui generis* which is of such intensity that it dominates all the others and holds them in thrall. And this does not simply amount to a *de facto* dominance, but is seen as being as of right, for the person who has such a privilege is possessed of such an aura of prestige that he seems to be in a sense superhuman; as a consequence we do not even conceive that he could be subject to ordinary restraints, as is the common run of humanity.

However brief and imperfect this analysis may be, it will at least suffice to caution us against committing certain errors which are still common. One sees, for instance, that, contrary to the mistaken notion perpetrated by Spencer, whether or not a government assumes an absolutist character does not depend on the number and importance of governmental functions. However numerous these may be, if they are not concentrated in the hands of one person, the government is not an absolute one. This is the situation found today in our great European societies, particularly in France. The sphere of State action is very much more extensive than it was under Louis XIV; but with the rights which it exercises over society go reciprocal duties; in no sense does it resemble a property-right. In practice, it is not only that the supreme regulatory functions are split up among distinct and relatively autonomous organs, however interdependent, but also that they do not exercise their powers without a degree of participation by other elements of society. Thus, from the fact that the State makes itself felt in a greater number of directions, it does not follow that it becomes more absolute. True, this may happen, but if this is to be the case there must be circumstances quite other than the greater complexity of functions which devolve upon it. On the other hand, the modest scope of its functions does not prevent a government taking on this character. Actually, if these functions are few in number and not very actively pursued, this is because social life itself on the more general level is impoverished and languishing; for the greater or lesser extent to which the central directive organ is developed only reflects the development of social life in general, just as the extent of the individual's nervous system varies with the

importance of the organic exchanges. The society's directive functions accordingly are only rudimentary when the social functions are of the same type; and thus the relationship between them remains constant. Consequently, the former retain their primacy, and these functions need only be concentrated in the hands of a single person to put him beyond criticism and to raise him infinitely far above the rest of society. Nothing is more simple than the rule of some barbarian chieftains; nothing is more absolute.

This observation leads us to another more closely related to the issue at hand: namely the fact that the degree to which a government possesses an absolutist character is not linked to any particular social type. Indeed, if one may find such a government as often in an extremely complex society as in a very simple one, it is no more tied exclusively to primitive societies than to other types. True, one might surmise that this concentration of governmental power always accompanies the concentration of the social mass, regardless of whether it be caused by this factor, or whether it helps bring it about. But it is not so. The Roman City, especially following the overthrow of the monarchy, was, until the last phase of the Republic, quite free of absolutism; yet, it was precisely under the Republic that the various segments or sub-groupings (*gentes*) which made up the city attained a very high degree of concentration and unity. Besides, we in fact observe examples of governments which deserve to be called absolute in the most diverse of social types, in seventeenth-century France as much as in the latter period of the Roman State or in a multitude of primitive kingdoms. Conversely, the same people, depending on the circumstances, can move from an absolute form of government to a completely different type; yet the same society can no more change its type in the course of its evolution than can an animal change its species during its own lifetime. France in the seventeenth and France in the nineteenth centuries belonged to the same social type and yet its major regulatory institutions were quite different. One cannot maintain that between Napoleon I and Louis-Philippe, French society moved from one kind of society to another, only to undergo a shift in the opposite direction from Louis-

Philippe to Napoleon III. Such changes contradict the very notion of species.[2]

This special kind of political organization is not, therefore, a consequence of the fundamental nature of the society, but rather depends on unique, transitory, and contingent factors. This is why these two causes of the evolution of punishment – the nature of the social type and of the governmental organ – must be carefully distinguished. For being independent, they act independently of one another, on occasion even in opposite directions. For example, it happens that, in passing from a primitive type of society to other more advanced types, we do not see punishment decreasing as we might have expected, because the organization of government acts at the same time to neutralize the effects of social organization. Thus, the process is a very complex one.

Having explained the nature of the law, we must now show that it conforms to the facts. Since there can be no question of examining every society, we shall choose the ones we are going to compare from among those where penal institutions have reached a certain degree of development and are known fairly precisely. For the rest, as we have tried to show elsewhere, the essence of a sociological explanation does not lie in piling up facts, but rather in organizing series of regular variations whose terms are bound together as closely as possible, and which are also sufficiently wide-ranging.

In a very large number of ancient societies death pure and simple is not the supreme punishment; it is augmented, in the case of those offences deemed most frightful, by further torments which are aimed at making it still more dreadful. Thus, among the Egyptians, above and beyond hanging and beheading, we find burning at the stake, 'death by ashes', and crucifixion. In the case of punishment by fire, the executioner used to begin by inflicting numerous wounds in the hands of the criminal using sharpened stakes, and only after this was the latter placed on a fire and burned alive. 'Death by ashes' consisted of suffocating the condemned man to death under a pile of ashes. 'It is even probable', says Thonissen, 'that the judges were accustomed to inflicting on the criminals whatever additional suffering they felt was required by the nature of the

crime or the exigencies of public opinion.' The Asian peoples would seem to have taken cruelty to even further lengths.

> Among the Assyrians, criminals were thrown to ferocious animals or into a fiery furnace; they were cooked to death in a brass pot placed over a slow fire; they had their eyes put out. Strangulation and beheading were spurned as being too mild! Among the various tribes of Syria, criminals were stoned to death, they were shot full of arrows, they were hanged, they were crucified, their ribs and entrails were burned with torches, they were drawn and quartered, they were hurled from cliffs . . . or they were crushed beneath the feet of animals, etc.

The code of Manu itself distinguishes between an ordinary death sentence, consisting of beheading, and a severe or aggravated death sentence. The latter was divided into seven categories: impalement on a pointed stake, being burned to death, being crushed to death under elephant's feet, judicial drowning, having boiling oil poured into one's ears and mouth, being torn apart by dogs in public, being cut into pieces with razors.

Among these same peoples, the ordinary death sentence was widely used. It is impossible to list all the offences punished in this way. A single fact illustrates how numerous they were: according to Diodore's account, one Egyptian king, by banishing those condemned to death into the desert, managed to establish a new city there, and another, by employing them in a programme of public works, succeeded in building numerous dikes and digging canals.

Punishments symbolic of the crime committed were used as less drastic penalties than the death sentence. Thus in Egypt, forgers, those who altered public documents, used to have their hands cut off; rape of a free-born woman was punished by castration; spies had their tongues torn out, etc. Likewise, after the laws of Manu, the tongue of a man in the lowest caste who had gravely insulted the twice-born[3] was to be cut out; a Sudra who had the audacity to sit down next to a Brahmin was to be branded on the buttocks, etc. Over and above these characteristic mutilations, all sorts of corporal punishment were customary in one tribe or another. This type of punishment was usually inflicted at the discretion of the judge.

The Hebrews certainly did not possess a higher type of society than these other peoples; indeed, the concentration of the society only occurred at a relatively late period, under the monarchy. Before this, there was no Israeli nation, but merely a more or less autonomous grouping of tribes or clans, which only united briefly if faced by a common threat. And yet Mosaic law is much less harsh than the law of Manu or the sacred books of Egypt. Capital punishment is no longer accompanied by the same refined cruelties. It even seems that, for a considerable period of time, stoning was the only way it was done; it is only in the rabbinical texts that there is mention of burning, beheading and strangulation. Mutilation, so widely practised by the other Oriental peoples, is only mentioned once in the Pentateuch. True, the principle of retaliation, when the crime involved wounding someone, might involve mutilation; but the guilty party could always escape this by means of a financial settlement; this practice was only forbidden in case of murder. As for other physical punishments, which are reduced to whipping, they were certainly used for a great number of offences, but the maximum penalty was fixed at 40 lashes, and in practice this number was really 39. Where does this relative mildness come from? From the fact that among the Hebrews absolutist government was never able to establish itself on a lasting basis. We have seen that for much of the time they lacked any sort of political organization. Later on, of course, a monarchy was formed; but the king's power remained very limited: 'There always existed a very lively belief in Israel that the king was there for the sake of the people and not the people for the sake of the king; he ought to seek to help Israel, and not to further his own self-interest.' Even though certain individuals occasionally succeeded, by dint of their personal prestige in winning an exceptional degree of authority, the temper of the people remained profoundly democratic.

Yet we have been able to see that the penal law still remained a very harsh one there. If we move from the preceding sorts of society to the City-State, which is without doubt a more advanced type of society, we observe a more marked decline in the severity of punishment. Although capital punishment at Athens was, in certain instances,

accompanied by other penalties, this was, nevertheless, highly exceptional. Such punishment consisted, in principle, of death by drinking hemlock, by the sword, by strangulation. Symbolic mutilation disappeared. It even seems that the same thing happened with corporal punishment, except for the slaves and, perhaps, the lower classes. Yet Athens, even viewed at its apogee, represents a relatively archaic form of the City. Indeed, organization based on the clan system (gene, phratres) was never as completely obliterated there as it was at Rome, where, from a very early period, curias and gentes became mere historical survivals, of whose meaning even the Romans themselves were uncertain. Consequently the system of punishments was much harsher at Athens than at Rome. First, Athenian law, as we noted above, did not completely avoid adding other punishments to the death sentence. Demosthenes alludes to culprits being nailed to the gallows; Lyseas cites the names of assassins, highway men, and spies beaten to death; Antiphon speaks of a poisoner dying on the rack. Sometimes death was preceded by torture. Besides this, the number of offences for which the death penalty was invoked was considerable: 'Treason, harming the Athenian people, assaults on the political institutions, debasing the national law, lying to the tribune of the people's assembly, abuse of diplomatic office . . . extortion, impiety, sacrilege, etc., etc., immediately brought forth the intervention of "The Eleven".[4] At Rome, on the other hand, capital crimes were much less numerous and the *Leges Porciae*[5] limited the employment of capital punishment throughout the Republic. Beyond this, except for totally exceptional circumstances, execution was never accompanied by lesser tortures, or by any further mistreatment. Crucifixion was only permitted for slaves. Moreover, the Romans were apt to boast of the relative leniency of their system of punishment: '*Nulli gentium mitiores placuisse pocuas*', said Titus Livy, and Cicero commented: '*Vestram libertatem, non acerbitate suppliciorum infestam, sed lenitate legum munitam esse voluerunt*'.

But when, with the advent of the Empire, governmental power tended to become absolute, the penal law became more severe. First, the number of capital crimes grew. Adultery, incest, all sorts of offences against public morals, and above all

the constantly growing number of crimes of lese-majesty were punished by death. At the same time, harsher forms of punishment were instituted. Burning at the stake, formerly reserved for political crimes of an exceptional nature, was used against arsonists, the sacrilegious, sorcerers, parricides, and certain other crimes of lese-majesty; the sentence '*ad opus publicum*' was established, and mutilations visited upon some classes of criminals (for example, castration in the case of certain offences against public morals, severing the hands of forgers, etc.). Finally, torture made its appearance; it was the Imperial period that the Middle Ages was later to borrow from.

If we move on from the City to the case of Christian societies, we observe punishment evolving according to the same law.

It would be a mistake to estimate the kind of punishment employed in feudal times according to the reputation for atrocity which the Middle Ages have been given. When we examine the facts we cannot but see that punishment was much milder than in earlier types of society, at least if one looks at them at the corresponding phase in their evolution, which is to say in their formative period and, so to speak, their first flush of youth; and it is only in these circumstances that the comparison has any illustrative value. Capital crimes were not very numerous. According to Beaumanoir, the only things which could not by some means be atoned for were manslaughter, treason, homicide, and rape. The laws of Saint Louis added to these abduction and arson. These were the major concerns of the higher courts. However, although robbery was not so termed, it too was a capital crime. The same thing happened with respect to two offences which were considered particularly threatening to the rights of the lord; these were the breaking of contracts and crimes of the highway (robbery of toll-houses with violence). As for religious crimes, the only ones which were then controlled by means of the death penalty were heresy and atheism. Those who committed sacrilege had only to do penance, as did blasphemers; indeed, Saint Louis having decided, in the first flush of the religious enthusiasm of his youth, that they ought to be branded on the forehead and to have their tongues pierced, found himself

censured by Pope Clement IV. It was only somewhat later that the Church displayed an implacable severity against its enemies. As for the punishments themselves, there was nothing outrageous about them. The only additions to the death penalty consisted in being dragged to execution on a hurdle and in being burned alive. Mutilations were uncommon. In other respects we know how humane the Church's system of control was. Its preferred modes of punishment were penances and abstinence. It spurned public humiliations, the pillory and its iron collar [the means of attaching a criminal to the pillory] although such punishments did not seem to it beyond its province. It is true that, when the Church judged a bloody repression to be necessary, it delivered up the guilty to secular justice. Nevertheless, the fact that the most influential moral force of the time bore witness in this manner to its horror of such punishments was of the greatest significance.[6]

This was roughly the situation up until about the fourteenth century. From then on the king's power became more and more firmly established. One sees that punishment increased in proportion to its consolidation. First, crimes of lese-majesty which were non-existent in feudal times, make their appearance, and the list of such crimes is a long one. Religious crimes take on this quality. Consequently sacrilege becomes a capital crime. The same applies to any trafficking with unbelievers, to all attempts 'to pursuade others of or argue for any and all beliefs which are, or might be, contrary to the sacred teachings of Our Lord'. Simultaneously, a greater rigour is manifested in the application of punishments. Those convicted of capital crimes may be stretched on the rack (it is at this stage that torture on the rack makes its appearance), buried alive, drawn and quartered, flayed alive, or boiled to death. Sometimes the condemned man's children were punished with him.

The apogee of the absolute monarchy coincides with the period of the greatest repression. In the seventeenth century the forms of capital punishment in use were still those we have just enumerated. Beyond this, a new punishment was introduced, the galleys, and this form of punishment was so terrible that the wretches condemned to it would sometimes sever their own arm or hand in order to escape it. The practice was even so common that a decree of 1677 made it punishable

by death. As for corporal punishments, these were countless: there was the ripping out or the piercing of tongues, cutting off of lips, cutting or tearing off ears, branding with a hot iron, beating with cudgels, the cat-o'-nine tails, the pillory, etc. Finally, we must not forget that torture was used not only as a means of getting information, but also as a means of punishment. At the same time, the number of capital crimes increased because the crimes of lese-majesty were growing ever more numerous.

Such was the state of the criminal law until the middle of the eighteenth century. There then occurred, throughout Europe, the protest to which Beccaria has given his name. Doubtless it would be a distortion to claim that the Italian criminologist was the initial cause of the reaction which was to subsequently proceed without interruption. The movement had begun before him. A whole series of works, now forgotten, had already appeared demanding the reform of the penal system. Yet it is incontestably the case that it was the 'Treatise on Crimes and Punishments' which delivered the mortal blow to the old and hateful routines of the criminal law.

An ordinance of 1788 had already introduced certain reforms which were not unimportant; but it was above all with the Penal Code of 1810 that the new aspirations were at last really satisfied. Accordingly, the appearance of the new code was received with great admiration, not only in France, but in all the major European countries. It represented, indeed, considerable progress in the direction of mitigating earlier severity. However, in point of fact, it still remained much too closely tied to the past. Thus it was not long before new reforms were being sought. There were complaints that the death penalty was still very widely employed, even if it could not be augmented as it was under the *ancien régime*. The retention of branding, the pillory, and mutilation of the parricide's hands was seen as inhuman. It was in response to these criticisms that the revision of 1832 took place. This introduced a much greater leniency into the penal system, suppressing all mutilations, decreasing the number of capital crimes, and at last giving the judges the power of lessening all penalties if there were extenuating circumstances. It is unnecessary to show that things have continued in the same

direction since then, so that today there are beginning to be complaints that things are being made too comfortable for criminals.

II THE LAW OF QUALITATIVE CHANGES

The law which we have just established refers exclusively to the severity or the quantity of punishments. The one which will now concern us is concerned with their qualitative aspects. It may be formulated thus:

Deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control.

Primitive societies almost completely lack prisons. Even in the laws of Manu, there is at most one passage which seems to concern itself with prisons. 'Let the king place all the prisons on the public highway, so that the criminals, hideous and humiliated, may be exposed in full view of everyone.' Yet such a prison has a completely different character than ours; it is more nearly analogous to the pillory. The guilty party was held prisoner so that he could be put on display and also because imprisonment was a necessary condition of the punishments being imposed on him; but not because this itself was the punishment. That consisted rather of the harsh existence imposed on all the detainees. The silence of the Mosaic law on this point is even more complete. There is not even a single mention of prison in the Pentateuch. Later on, in the Chronicles, in the book of Jeremiah, one does come across passages which speak of prisons, of fetters, of damp dungeons; but, in all these cases, what is in question is preventive custody, places of detention where people accused of crimes, are held while awaiting trial, and where they had to submit to a régime of greater or lesser severity, depending on their particular circumstances. It is only in the book of Ezra that imprisonment appears, for the first time, as a punishment properly so-called[7] In the ancient law of the Slavs and the Germans, punishments simply involving deprivation of liberty would seem to have been similarly missing. The same was true of the old Swiss cantons until the nineteenth century.

In the City-States such punishments had begun to make their appearance. Contrary to what Schoemann says, it seems certain that at Athens imprisonment was inflicted as a special punishment in some situations. Demosthenes expressly states that the tribunals were empowered to punish by imprisonment or by any other punishment. Socrates speaks of life imprisonment as a penalty which could be invoked against him. Plato, outlining in *The Laws* the plans of the ideal city, proposes to repress quite a large number of offences by imprisonment, and we know that his utopia is nearer to historical reality than it was at one time thought to be. However, everyone recognizes that at Athens this type of punishment remained little developed. In the orators' speeches, prison is most often put forward as a way of preventing the flight of those accused of a crime or as a convenient way of forcing some debtors to pay their debts, or indeed as a supplementary form of punishment, a *prostimema*. When the judges restricted themselves to imposing a fine they had the right to supplement this with a term of five days in the public prison with one's feet shackled. At Rome, the situation was not very different. 'Prison', states Rein, 'was originally no more than a place for preventive detention. Later it became a means of punishment. However, it was rarely used, except for slaves, soldiers and actors.'

It is only in the Christian societies that it has completely developed. The Church, indeed, from very early on was accustomed to prescribe temporary detention or life in a monastery for some criminals. At first this was thought of as no more than a means of surveillance, but later on incarceration, or imprisonment properly so-called, came into existence, being regarded as a genuine punishment. The maximum sentence was permanent solitary confinement in a cell which had been bricked up, as a sign of the irrevocability of the sentence.

It is from here that the practice passed over into the secular legal system. However, as imprisonment was simultaneously used as an administrative measure, the sense in which it was a punishment remained for a long time rather ambiguous. It is only in the eighteenth century that criminologists ended up agreeing to recognize imprisonment as a kind of punishment in certain definite situations, when it was for life, when it was

substituted by a commutation for the death penalty, etc.; in a word, every time it had been preceded by a legal investigation. With the penal law of 1791, it became the basis of the system of control, which, other than the death penalty and the pillory, consisted of no more than various kinds of imprisonment. Nevertheless, imprisonment by itself was not considered a sufficient punishment; but deprivations of another kind were added to it (belts or chains which the inmates had to wear, and a miserable diet). The Penal Code of 1810 left aside these additional penalties, except for hard labour. The two alternative punishments involving deprivations of liberty scarcely differed from one another except in respect of the amount of time during which the prisoner was shut up. Since that time, hard labour has lost a great part of its distinctive character and is tending to become simply another kind of imprisonment. At the same time, the death penalty has been utilized less and less frequently; it has even disappeared completely from some legal codes, to such an extent that virtually the whole field of punishment is now found to consist in the suppression of liberty for limited period of time or for life.

EXPLANATION OF THE SECOND LAW

Having shown how punishment has varied through time, we will now seek the causes of the established variations; in other words, we shall try to explain the two laws previously established. We will begin with the second.

As we have just seen, incarceration first appears only as a simple preventive measure; it later takes on a repressive character, and finally becomes equated with the very notion of punishment. To account for this evolution, we must in turn search for what gives birth to imprisonment in its original form – and then see what has determined its subsequent transformations.

It is easy to understand why imprisonment is not present in relatively under-developed societies: it does not serve any need. In these societies responsibility is collective; when a crime is committed, it is not only the guilty party who pays penalty or reparation. The clan also takes part, either together

with or in place of the transgressor. At a later time, when the clan has lost its familial character, it is replaced by a still fairly extensive circle of kinsmen. Under these conditions, there is no reason to arrest and hold under guard the presumed author of an act. For if, for one reason or another, he is missing, others remain. Furthermore, the moral and legal independence, which characterizes each familial group at this time, serves to restrain the demand that one of its members be handed over in this way on mere suspicion. But to the extent that society is centralized, these elementary groups lose their autonomy and become merged with the total mass, and responsibility becomes individual. Consequently, some measures are necessary to prevent punishment being evaded by the flight of those who have earned it and at the same time these measures are less offensive to established morality. We find it in Athens, Rome, and among the Hebrews after the time of the Exile. But it is so contrary to the principles of ancient social organization that it runs up against obstacles which narrowly restrict its use, at least wherever the power of the State is subject to some limitation. It is for this reason that in Athens preventive detention was authorized only in particularly serious cases. Even the murderer was able to remain at liberty right up until the day of sentence. In Rome, the accused 'was at first only made a prisoner in the case of a flagrant and manifest misdemeanour, or when there was a confession; ordinarily, a bail-bond sufficed'.

One must beware of explaining these apparent restrictions on the right of pre-trial detention by a sentiment of personal dignity and a sort of precocious individualism, which were scarcely part of the morality of the ancient City-State. What limits the legal power of the State is not the just claim of the individual, but that of the clan or the family, or at least what remains of it. This is not an anticipation of our modern morality, but an archaic survival.

However, this explanation is incomplete. To explain an institution, it is not enough to establish that when it appeared it served some useful end; for just because it was desirable it does not follow that it was possible. In addition, one must discover how the necessary conditions for the realization of that goal came into existence. However strong a need may be,

it cannot create *ex nihilo* the means for its own satisfaction; we must therefore search out where these came from. No doubt at first sight it would seem just common sense that from the day that the prison would have served a useful function for societies, men would have had the idea of building it. In reality, however, this development presupposes the realization of certain conditions without which it could not come about. In practice, it implies the existence of sufficiently spacious public establishments, run on military lines, managed in such a manner as to prevent communications with the outside, etc. Such arrangements are not improvised on the spur of the moment. Indeed, there exist no traces of them in primitive societies. The very meagre, very intermittent public life which then exists requires nothing more for its development than a place for popular assemblies. Houses are constructed with exclusively private ends in mind; in places where there are permanent chiefs, their houses are scarcely distinguished from the others; temples themselves are of relatively late origin; finally, ramparts do not exist, for they appeared only with the rise of the City State. In these conditions, the concept of a prison cannot arise.

But as the social horizon extends, as collective life, instead of being dispersed in a multitude of small centres where it can only be weak, is concentrated in a more limited number of places, it becomes at the same time more intense and more continuous. Because this sphere assumes greater importance, so the dwelling places of those who direct it are transformed. They are enlarged, they are organized in terms of the wider and more permanent functions which are laid upon them. The more the authority of those who live there grows, the more their homes are marked off and distinguished from the rest of the dwellings. They take on a lofty air, they are protected behind higher walls, deeper ditches, in such a way as to visibly mark the line of demarcation which henceforth separates the holders of power from the mass of their subordinates. The conditions for the creation of the prison are now present. What makes one suppose that the prison must have arisen in that way is that in the beginning it often appears in the shadow of a royal palace, in the outbuildings of temples and similar buildings. Thus, in Jerusalem we know of three prisons

during the period of the invasion of the Chaldeans: one was 'at the high gate of Benjamin', and we know that the gates were fortified places; another was in the court of the royal palace; and the third was in the house of a royal functionary. In Rome, it is in the royal fortress that the most ancient prisons are found. In the Middle Ages, it is in the manorial castle, in the towers of the ramparts which surround the towns.

Thus, at the very time when the establishment of a place of detention was becoming useful in consequence of the progressive disappearance of collective responsibility, buildings were arising which could be utilized for this purpose. The prison, it is true, was still only a place of pre-trial detention. But once that it had been set up on this basis, it quickly assumed a repressive character, at least partially. In fact, all those who were thus kept prisoner were suspects; they were also most frequently those suspected of serious crimes. Furthermore, they were subjected to a severe regimen which was already virtually a punishment. Everything that we know about these primitive prisons, which, let it be remembered, are still not penitentiaries in the strict sense, paints them in the blackest of colours. In Dahomey, the prison is a hole, in the form of a pit where the condemned wallow in refuse and vermin. In Judaea, we saw that they used dungeons. In ancient Mexico, it consisted of wooden cages where the prisoners were kept; they were scarcely fed. In Athens, the prisoners were subjected to the dishonourable punishment of shackles. In Switzerland, to make escape more difficult, they put iron collars on the prisoners. In Japan, the prisons are called hells. It is natural that a sojourn in such places should have been very early considered as a form of punishment. Petty crimes, especially those which have been committed by the people of slender means, the *personae humiles*, as the Romans called them, were dealt with in this way. It was a penalty which the judges could impose more or less arbitrarily.

As to the juridical development of this new punishment from the time of its formation onward, it can be accounted for by combining the preceding considerations with the law relating to the progressive weakening of punishment. In practice, this weakening takes place from top to bottom of the penal code. In general, it is the most serious punishments

which are the first to be affected by this regression, that is to say, which are the first to grow milder, then to disappear. The process begins with the diminution of the aggravated forms of capital punishment, which continues until the day is reached when they are completely done away with. The crimes to which capital punishment is applied are gradually curtailed; mutilations are subject to the same law. It follows from this that lesser punishments must be developed to fill the gaps which this regression produces. In proportion as the penal law abandons the archaic forms of repression, new forms of punishment invade the free spaces which they then find before them. Now the various modes of imprisonment are the last punishments to develop. At first, they are lowest in the scale of penalties, since they begin by not being punishments at all, properly so called, but only the condition of true repression; and for a long time, they retain a mixed and indecisive character. For this reason, the future was reserved for them. They were the necessary and natural substitutes for the other punishments which were fading away. But from another perspective, they were themselves influenced by the trend towards moderation. This is why, whereas originally they were mingled with other hardships to which they were occasionally only ancillary, they are gradually disentangled from them. They are reduced to their simplest forms, which is to say, to deprivation of liberty alone, varying only with respect to the length of that deprivation.

Thus, the qualitative changes in punishment are in part dependent on the simultaneous quantitative changes it undergoes. In other words, of the two laws which we have established, the first contributes to an explanation of the second. Thus, the time has now arrived to explain it in its turn.

EXPLANATION OF THE FIRST LAW

In order to facilitate this explanation, we will consider the two factors which we have distinguished separately; as the second is the one which plays the least important role we will leave it on one side for the moment. Let us look, therefore, at how it is

that punishments become less severe as one moves from the most primitive to the most advanced societies, without bothering ourselves temporarily with those perturbations which may be due to the more or less absolute character of governmental power.

One might be tempted to explain this decline in severity in terms of a corresponding softening of mores. We have more and more horror of violence; violent, that is to say cruel, punishments must therefore inspire in us a growing repugnance. Unfortunately, this explanation may be reversed. For while, on the one hand, our greater humanity makes us recoil from inflicting painful punishments, it must simultaneously make the inhuman acts which these punishments repress seem more odious to us. If our more developed altruism finds the idea of making others suffer repugnant, for the very same reason the crimes which offend these sentiments must seem to us more abominable; and consequently we will inevitably tend to repress them more severely. Not only is this so, but this tendency can be only partially and weakly neutralized by the opposing tendency, which leads us to make the guilty suffer as little as possible, even though they both have the same origin. For it is undeniable that our sympathy must be less for the offender than for his victim. Consequently, greater moral sensitivity would rather have led to a harsher punishment, at least for all the crimes which inflict harm on other human beings. In fact, when it begins to appear to a marked degree in the course of history, this is just the way it manifests itself. In primitive societies, murder and simple theft are only feebly repressed, since the mores there are coarse. In Rome, for a long time, violence was not regarded as invalidating contracts, let alone as something penal. But from the time that man's sympathetic feelings for man were affirmed and developed these crimes have been punished more severely. The movement must necessarily have continued if some other cause had not intervened.

Since punishment results from crime and expresses the manner in which it affects the public conscience, it is in the evolution of crime that one must seek the cause determining the evolution of punishment.

Without it being necessary to go in detail into the proofs

which justify the distinction, we think it will be readily conceded that all acts deemed criminal in every known society may be divided into two basic categories: those which are directed against collective things (whether ideal or material, it matters not) of which the principal kinds are offences against public authority and its representatives, the mores, traditions and religion; and those which only injure the individual (murders, thefts, violence and fraud of all types). These two forms of criminality are sufficiently distinct that there is every reason to designate them by different words. The first may be called religious criminality because outrages against religion are the most essential part of it, and because crimes against tradition or chiefs of state have always had a more or less religious character; the second, one might term human criminality. Granting this distinction, we know that the penal law of primitive societies consists almost exclusively of crimes of the first type; but, as evolution advances, so they decline, while outrages against the person take up more and more space. For primitive peoples, crime consists almost uniquely in not performing cult practices, in violating ritual prohibitions, in straying from ancestral morality, in disobeying authority where it is quite firmly established. By contrast for the European of today, crime consists essentially in the injury of some human interest.

Now, these two kinds of criminality differ profoundly because the collective sentiments which they offend are not of the same type. As a result, repression cannot be the same for one as for the other.

The collective sentiments which are contradicted and offended by the criminality characteristic of primitive societies are collective, as it were, in a double sense. Not only have they the collectivity as their subject, so that they are found in the majority of individual consciences, but more than that *they have collective things as their object*. By definition, these things are outside the circle of our private interests. The ends to which we are thus attached infinitely surpass the narrow horizon we each have as individuals. It is not us personally with which they are concerned, but with the collective existence. Consequently, the acts which we must perform in order to satisfy them do not correspond to our own individual

inclinations; but rather they do violence to them since they consist in all kinds of sacrifices and privations which a man has to impose upon himself whether it be for the purpose of humouring his god, to conform to custom, or to obey authority. We do not have an inclination to fast, to mortify ourselves, to forbid ourselves one or another kind of meat, to sacrifice our favourite animals on the altar, to inconvenience ourselves out of respect for custom, etc. Consequently, just as with the sensations which come to us from the external world, such sentiments are in us but not of us; even exist, in a sense, in spite of us; and they appear to us in this way in consequence of the constraint which they exercise over us. We are thus obliged to alienate them, to assign as their cause some external force, just as we do for our sensations. Moreover, we are obliged to conceive of this force as a power which is not only extraneous, but even superior to us, since it gives the orders and we obey them. This voice which speaks within us in such an imperious tone, which enjoins us to do violence to our nature, can come only from a being other than ourselves, and one, moreover, which dominates us. In whatever special form men have portrayed it (god, ancestors, august personages of all kinds), it always has in its relation to them something transcendent, superhuman about it. That is why this part of morality is wholly imbued with religiosity. The duties which it prescribes for us bind us to a personality which infinitely surpasses our own; the collective personality, which we may think of as a pure abstraction, or with the help of what are properly religious symbols, the guise in which it most frequently appears.

In the case of crimes which violate these sentiments and which consist of the neglect of special obligations, these cannot fail to appear to us as directed against these transcendent beings, since they do indeed strike at them. It is because of this that they appear exceptionally odious; for an offence is the more revolting when the person offended is higher in nature and dignity than the offender. The more one is held in respect, the more abominable is lack of respect. An act which is simply reprehensible when directed at an equal becomes sacrilegious when it concerns someone who is superior to us; the horror which it produces can therefore only be calmed by a

violent repression. Normally, when simply trying to please his gods, the faithful man must submit to a thousand privations if he is to maintain regular relations with them. To what privations must he not be subjected when he has outraged them? Even were the pity which the guilty party inspires quite strong, it could not serve to effectively counterbalance the indignation aroused by the act of sacrilege, nor, consequently, to modify appreciably the punishment; for the two sentiments are too unequal. The sympathy which men experience for one of their kind, especially one disgraced by an offence, cannot restrain the effects of the reverential fear which they feel for the divinity. In the face of a power which is so much greater than him, the individual appears so insignificant that his sufferings lose their relative importance and become a negligible quantity. For what is an individual's suffering when it is a question of appeasing a God?

It is otherwise with collective sentiments which have the individual for their object; for each of us is an individual. What concerns humankind concerns us all; for we are all men. Consequently we take sentiments protecting human dignity personally to heart. Of course, I do not mean to say that we respect the life and property of our fellows out of a utilitarian calculation and to obtain from them a just reciprocity. If we reprove acts which lack humanity, it is because they offend the sentiments of sympathy which we have for man in general, and these sentiments are disinterested precisely because they have a general object. This is the great difference which separates the moral individualism of Kant from that of the utilitarians. Both, in a sense, make the development of the individual the object of moral conduct. But for the latter the individual in question is the tangible, empirical individual, as realized in each particular conscience; for Kant, on the other hand, it is the human personality, it is humanity in general, in abstraction from the concrete and diverse forms under which it presents itself to the observer. Nevertheless, however universal it may be, such a conception is closely related to that towards which our egoistic tendencies incline us.

Between man in general and the man whom we are there is not the same difference as that between a man and a god. The nature of this ideal being differs only in degree from our own;

it is only the model of which we are various examples. The sentiments which attach us to it are thus, in part, the extension of those which attach us to ourselves. It is this which is expressed in the popular saying: 'Do not do unto others that which you would not wish done to you.'

Consequently, for us to explain these sentiments and the acts towards which they impel us, it is not necessary, to the same degree, to seek some transcendent origin of them. To account for the respect we feel for humanity, there is no need to suppose that it is imposed on us by some power exterior to and superior to humanity; it already appears intelligible to us just because we feel we are men ourselves. We are aware that it conforms more to the natural inclination of our sensibility. Unlike the previous type, the crimes which offend this will not, therefore, seem to us to be directed against some superhuman being. We shall not see in them acts of 'lese-divinity', but simply of 'lese-humanity'. Unquestionably, this ideal is far from being deprived of all transcendence; it is in the nature of every ideal to surpass reality and to dominate it. But this transcendence is much less marked. If this abstract man is not to be confused with any one of us, each of us realizes him in part. Since it is essentially human, no matter how elevated this end may be, it is also immanent in us to some degree.

Consequently, the conditions of repression are no longer the same as in the first case. There is no longer the same distance between the offender and the offended; they are more nearly on the same level. This is the more so as, in each particular case, the victim of the crime offers himself in the guise of a particular individuality, in all respects identical to that of the transgressor. The moral scandal which the criminal act constitutes is, therefore, less severe, and consequently does not call for such violent repression. The offence of man against man cannot arouse the same indignation as an offence of man against God. At the same time, the sentiments of pity which he who suffers punishment evokes in us can no longer be so easily nor so completely extinguished by the sentiments he has offended and which react against him; for both are of the same nature. The first sentiments are only a variety of the second. What tempers the collective anger, which is the essence of punishment, is the sympathy which we feel for every man who

suffers, the horror which all destructive violence causes us; it is the same sympathy and the same horror which inflames this anger. And so the same cause which sets in motion the repressive apparatus tends also to halt it. The same mental state drives us to punish and to moderate the punishment. Hence an extenuating influence cannot fail to make itself felt. It might appear quite natural to freely sacrifice the human dignity of the transgressor to the outraged divine majesty. But there is a real and irremediable contradiction in avenging the offended human dignity of the victim by violating that of the criminal. The only way, not of eliminating the difficulty (for strictly speaking it is insoluble), but of alleviating it, is to lessen the punishment as much as possible.

Seeing as, in the course of time, crime is reduced more and more to offences against persons alone, while religious forms of criminality decline, it is inevitable that punishment on the average should become weaker. This weakening does not come from the fact that morals become less harsh, but from the fact that religiosity, which was earlier imprinted in both the penal law and the collective sentiments which underlay it, steadily declines. Doubtless, the sentiments of human sympathy simultaneously become livelier; but this greater liveliness is not sufficient to explain this progressive moderation in punishments; since, by itself, it would tend to make us more severe towards all those crimes of which man is the victim, and to increase the repression of such crimes. The true reason is that the compassion of which the condemned man is the object is no longer overwhelmed by the contrary sentiments which would not let it make itself felt.

But, you may say, if this is the case, how is it that punishments attached to crimes against persons participate in the general decline? For, if they have declined less than the others, it is still certain that they too are, in general, less harsh than they were two or three centuries ago. If, however, it is in the nature of this type of crime to call forth less severe punishments, the effect should have shown itself from the first, as soon as the criminal character of these acts was formally recognized; punishments directed against them ought to have immediately and at a single stroke attained the degree of mildness which they allow of, rather than becoming

progressively milder. But what determines this progressive softening, is that at the time when these crimes, having remained for a long time on the threshold of the criminal law, were brought within it and finally classed as part of it, religious criminality held almost complete sway in this area. As a result of this preponderant situation, it began by pulling into its orbit those new offences which had just been created and marked them with its imprint. So much so, that just as crime is essentially conceived as an offence directed against the divinity, so crimes committed by man against man are also conceived on this same model. We believe that they also repel us because they are defended by the gods and, by the same token, outrage them. The habits of mind are such that it does not even seem possible that a moral precept can have a sufficiently well-founded authority if it does not derive from what is at the time considered as the unique source of all morality. Such is the origin of these theories, still so widespread today, according to which morality lacks all basis if it does not rest upon religion, or, at the very least, on a rational theology; that is to say, if the categorical imperative does not emanate from some transcendent being. But to the extent that human criminality develops and religious criminality recedes, the former shows more and more clearly its own physiognomy and distinctive traits, such as we have described. It frees itself from the influences to which it used to be subjected and which prevented it from being itself. If, even today, there are a good many people for whom the penal law, and more generally all morality, are inseparable from the idea of God, yet their number is diminishing; and even those who lag behind in this archaic conception are no longer as narrowly tied to these ideas as a Christian of earlier times used to be. Human morality progressively sheds its primitively confessional character. It is in the course of this development that that regressive evolution of punishments which makes the most grave breaches in the prescriptions of this morality occurs.

But a reciprocal influence must be noted, for as human criminality gains ground, it reacts in its turn on religious criminality and, so to speak, assimilates it. If it is offences against persons which constitute the principal crimes today, offences against collective things (crimes against the family,

against morals, against the State) nevertheless still exist. However, these collective things themselves tend to lose more and more that religiosity which formerly marked them. From the divinities which they were, they are becoming human realities. We no longer hypostasize the family or society in the form of transcendent and mystical entities; we see scarcely more than human groups who coordinate their efforts with a view to achieving human goals. As a result, crimes directed against these collectivities partake of the characteristics of those which directly injure individuals; and punishments which are aimed at the former themselves become milder.

Such is the cause which had determined the progressive weakening of punishments. One can see that this result is produced mechanically. The manner in which collective sentiments reacted against crime changed because these sentiments changed. New forces came into play; the result could not remain the same. This great transformation has not taken place with a view to a preconceived end nor under the direction of utilitarian considerations. But, once accomplished, it finds itself quite naturally adjusted to useful ends. For the very reason that it had necessarily resulted from the new conditions in which societies found themselves placed, it could not be other than in relationship and harmony with those conditions. In fact, the intensity of punishments serves only to make individual consciences aware of the force of collective constraint; so it is useful only if it varies with the same intensity as this constraint. It is fitting that it becomes milder as collective coercion becomes lighter, more flexible, becomes less inaccessible to free examination. Now this is the great change produced in the course of moral evolution. Although social discipline, of which morality properly so-called is only the highest expression, progressively extends its field of action, it loses more and more of its authoritarian rigour. Because it becomes more human, it leaves more room for the sponteneity of individuals; it even solicits it. It has therefore less need to be violently imposed. And for this to occur, the sanctions which assure it respect must also become less constricting on all initiative and thought.

We may now return to the second factor of penal evolution, which we have up until now left out of account; namely the

nature of the means of government. The preceding considerations will readily allow us to explain the manner in which they act.

In truth, the constitution of an absolute power necessarily has the effect of raising the one who wields it above the rest of humanity, making of him something superhuman; the more so as the power with which he is armed is more unlimited. In fact, wherever the government takes this form, the one who controls it appears to people as a divinity. When they do not make an actual god of him, they at the very least see in the power which is invested in him an emanation of divine power. From that moment, this religiosity cannot fail to have its usual effects on punishment. On the one hand, offences directed against a being so palpably superior to all its offenders will not be considered as ordinary crimes, but as sacrilegious acts and, by virtue of this, will be violently repressed. From this stems the exceptional position that the penal law assigns to crimes of lese-majesty among all peoples subjected to an absolutist government. From another point of view, as in these same societies almost all the laws are supposed to emanate from the sovereign and express his will, so the principal violations of the law appear to be directed against him. The reprobation which these acts arouse is thus much stronger than if the authority to which they cause injury was more dispersed, and consequently more moderate. The fact that it is concentrated at this point, rendering it more intense, also makes it more sensitive to all who offend it, and more violent in its reactions. Thus the gravity of most crimes is heightened by degrees; consequently, the average intensity of punishment is extraordinarily increased.

CONCLUSIONS

Understood in this way, the law which we have just described takes on a quite different significance.

In fact, if one goes to the root of things, one can now see that it explains not merely, as it might seem at first sight, the quantitative variations through which punishment has passed, but also qualitative variations. If the punishment is milder

today than formerly it is not because former penal institutions, while remaining intact, have little by little lost their rigour; but rather that they have been replaced by different institutions. The motive forces which have determined each of these are not of the same type. It is no longer that lively emotion, that sudden explosion, that indignant bewilderment aroused by an outrage directed against a being whose value immeasurably surpasses that of the aggressor; it is more that calmer and more reflective emotion provoked by offences which take place between equals. Blame is no longer the same and does not exclude pity; by itself, it calls for moderation. Hence, the necessity for new punishments which are in accord with this new mentality.

This allows us to avoid an error to which the immediate observation of the facts might have led. Seeing with what regularity repression seems weaker the further one goes in evolution, one might believe that the movement is destined to continue without end; in other words, that punishment is tending toward zero. Now, such a consequence would be in contradiction with the true sense of our law.

In fact, the cause which has determined this regression would not produce its attenuating effects indefinitely. For it does not result from a kind of sluggishness of the moral conscience which, gradually losing its strength and its original sensitivity, would become more and more incapable of all energetic penal reaction. We are not more complacent today than formerly toward all crimes indiscriminately, but only toward some of them; there are some, on the contrary, towards which we are more severe. However, those to which we show increasing indulgence, turn out to be also those which provoke the most violent repression, inversely, those for which we reserve our severity call forth only moderate punishments. Consequently, as the former, ceasing to be treated as crimes, are removed from the penal law and give place to others, it must necessarily produce a weakening of the average punishment. But this weakening can last only as long as this substitution goes on. The moment must come – and it has almost arrived – when this will be accomplished, when offences against the person will fill the whole of criminal law, or even when what remains of the other offences will be

considered no more than an appendage of the previous sort. Then the movement of retreat will cease. For there is no reason to believe that human criminality must in its turn regress as have the penalties which punish it. Rather, everything points to its gradual development; that the list of acts which are defined as crimes of this type will grow, and that their criminal character will be accentuated. Frauds and injustices, which yesterday left the public conscience almost indifferent, arouse it today, and this sensitivity will only become more acute with time. There is not in reality, therefore, a general weakening of the whole apparatus of repression; rather, one particular system weakens, but it is replaced by another which, while being less violent and less harsh, does not cease to have its own severities, and is certainly not destined to an uninterrupted decline.

This explains the state of crisis in which the penal law of all the civilized peoples is found. We have arrived at the time when penal institutions of the past have either disappeared or are surviving by not more than force of habit, but without others being born which correspond better to the new aspirations of the moral conscience.

NOTES

1 See *Règles de la Methode Sociologique* Ch. 4.

2 This is why it does not seem to us to be very scientific to classify societies according to their degree of civilization, as both Spencer and Steinmetz have done. For one is then obliged to classify one and the same society into several social species, according to the political structure it has successively assumed or according to the degree of civilization which it has progressively passed through. What would one say of a zoologist who classified the same animal into different species in this fashion? And yet a society has, even more than does an organism, a definite character, unique to itself, in certain respects, from the beginning to the end of its existence; consequently, a system of classification which fails to recognize this fundamental unity seriously distorts reality. One can, of course, distinguish in this fashion between social states, not societies; and social states separated thus from the permanent substructure which binds them one to another, rest on a foundation of air. It is therefore the analysis of this infrastructure, and not the changing ways of living which it sustains, which alone can provide the basis for a rational classification.

3 The term used by Durkheim is *Dwidjas*, which refers to any members of the three higher castes, i.e. the twice born. [Eds]

4 'The Eleven' refers to a committee of eleven people charged with making sure that punishments prescribed by the Athenian courts were carried out. [Trs.]

5 Three laws of the second century BC which stated that no Roman citizen should be put to death without trial. [Trs.]

6 This relative leniency of punishment was even more marked in those parts of the society which were democratically governed, namely the free townships. 'In the free towns', says Du Boys 'as well as in the chartered towns properly so called, we find a tendency to alter the penal system and the reparations and to make use of disgrace rather than executions or coercive punishments as a means of social control. Thus, at Mont-Chabrier, the man who stole two coins was made to carry these two coins hung round his neck and in this state to roam about for a day and a night, and after this, a fine of five coins was inflicted on him.' Kohler has made the same observation with respect to the Italian cities.

7 'For all those who will not obey the law of your God and the king's law, let them be immediately brought to justice and let them be condemned either to death or to exile . . . or to imprisonment'. (Ezra 7.26)

CHAPTER 5

The Legal Prohibition of Suicide

RELATIONS OF SUICIDE WITH OTHER SOCIAL PHENOMENA

Since suicide is a social phenomenon by virtue of its essential element, it is proper to discuss the place it occupies among other social phenomena.

The first and most important question which concerns the subject is to discover whether or not suicide should be classed among the actions permitted by morality or among those proscribed by it. Should it be regarded to any degree whatever as a criminal act? The question, as is well known, has always been warmly discussed. For its solution a certain conception of ideal morality is usually first formulated and then the question is raised whether or not suicide logically contradicts it. For reasons elsewhere set forth[1] this cannot be our method. An uncontrolled deduction is always suspect, and as such, moreover, starts from a pure postulate of individual feeling; for everyone conceives in his own way the ideal morality so axiomatically assumed. Instead, let us first seek to discover how peoples actually have estimated suicide morally in the course of history; then try to find reasons for this estimate. Then, we will have only to see whether and how far these reasons are founded in the nature of present-day societies.

I

As soon as Christian societies were formed, suicide was formally forbidden in them. In 452 the council of Arles declared suicide a crime and that it could only be caused by a

Source: Durkheim, E. *Suicide: A Study in Sociology* (London, Routledge & Kegan Paul, 1952) Chapter 2. Translated by G. J. A. Spaulding and G. Simpson.

diabolically inspired fury. But this order received a penal sanction only in the following century, at the council of Prague in 563. There it was decided that victims of suicide would be 'honoured with no memorial in the holy sacrifice of the mass, and the singing of psalms should not accompany their bodies to the grave.' Civil legislation followed the lead of canon law, adding material penalties to religious penalties. A chapter of St Louis' institutions especially regulates the matter; the body of the suicide was tried before the authorities otherwise competent in cases of the homicide of one person by another; the deceased's property was diverted from the usual heirs and reverted to the baron. Many customs did not stop at confiscation but prescribed various tortures in addition. 'At Bordeaux the corpse was hung by the feet; at Abbeville it was dragged through the streets on a hurdle; at Lille, if it was a man, the corpse was hung after being dragged to the crossroads, if a woman, burned.' Even insanity was not always considered an excuse. The criminal ordinance issued by Louis XIV in 1670 codified these usages without much modification. A regular sentence of condemnation was spoken *ad perpetuam rei memoriam*; the body drawn on a hurdle, face down, through the streets and squares, was then hung or thrown upon the garbage heap. The property was confiscated. Nobles incurred the loss of nobility and were declared commoners; their woods were cut, their castles demolished, their escutcheons broken. We still have a decree of the Parliament of Paris, given 31 January 1749, in agreement with this legislation.

By an abrupt reaction the revolution of 1789 abolished all these repressive measures and erased suicide from the list of legal crimes. But all the religions numbering Frenchmen among their followers still prohibit and punish it, and common morality reproves it. It still inspires an aversion in popular consciousness extending to the place where the suicidal act was performed and to all persons closely related to the victim. It constitutes a moral flaw although opinion seems tending to become more indulgent on this point than formerly. But, it has preserved something of its old criminological character. According to the most widespread jurisprudence, an accomplice of suicide is prosecuted as a

homicide. This would not be so if suicide were considered an act indifferent to morality.

This same legislation is found among all Christian peoples and has remained more severe almost everywhere else than in France. In England, in the tenth century, King Edward in one of his Canons associated suicides with robbers, assassins and criminals of every kind. Up to 1823 it was customary to drag the suicide's body, pierced crossways with a stick, through the streets and bury it on a highway without any ceremony. Even today burial is separate. The suicide was declared a felon (*felo de se*) and his property reverted to the Crown. Only in 1870 was this provision abolished together with all confiscations for felony. To be sure, the excessive character of the punishment had made it inapplicable for a long time before; the jury evaded the law, usually by declaring that the suicide had acted in a moment of insanity and was therefore irresponsible. But the act is still designated as a crime; whenever committed it is regularly reported and sentenced, and the attempt is punished in principle. According to Ferri, even in 1889, 106 legal proceedings were instituted for the offence and 84 sentences of condemnation passed in England alone. This is still more the case with complicity.

Michelet relates that at Zurich the corpse was formerly subject to horrible treatment. If the man had stabbed himself, a bit of wood in which the dagger was fixed was driven into the body near the head; if he had drowned himself, he was buried under five feet of water in the sand. In Prussia until the Penal Code of 1871, burial had to be without any display and without religious ceremony. The new German penal code still punishes complicity with three years of imprisonment (art. 216). In Austria, the old canonical prescriptions are almost completely observed.

Russian law is more severe. If the suicide seems not to have acted under the influence of mental disturbance, chronic or temporary, his will is annulled and all the material dispositions he made in anticipation of death are likewise annulled. Christian burial is refused him. The mere attempt is punished by a fine which is fixable by ecclesiastical authority. Finally, whoever incites another to kill himself or helps him carry out

his resolve in any way, as by supplying him with the necessary instruments, is treated as an accomplice of premeditated homicide. The Spanish Code, besides religious and moral penalties, imposes confiscation of property and punishes any complicity.

Finally, the Penal Code of the State of New York, though of recent date (1881), terms suicide a crime. To be sure, in spite of this, punishment has been given up for practical reasons, since the penalty could in no way affect the guilty person. But the attempt may incur a sentence either of imprisonment up to two years, a fine up to $200.00, or both penalties. The mere fact of advising the suicide or favouring its performance is associated with complicity in murder.

Mahometan societies prohibit suicide with equal vigour. 'Man', says Mahomet, 'dies only by the will of God according to the book which fixes the term of his life.' 'When the term has arrived they cannot delay or hasten it by a single moment.' 'We have decreed that death shall strike you each in turn and no one shall anticipate us.' Nothing, in fact, is more contrary to the general spirit of Mahometan civilization than suicide; for the virtue set above all others is absolute submission to the divine will, the docile resignation 'which makes one endure all patiently'. As an act of insubordination and revolt suicide could therefore only be regarded as a grave offence to fundamental duty.

If we turn from modern societies to the historically earlier ones of the Greco-Latin City-States, we find legislation concerning suicide there also, but not based wholly on the same principle. Suicide was only considered illegal if it was not authorized by the State. Thus at Athens a man who had killed himself was punished with 'atimia' for having committed an injustice to the city; the honours of regular burial were denied him; also his hand was cut from his body and buried separately. It was the same at Thebes with variations in detail, and also at Cyprus. The rule was so severe at Sparta that Aristodemus was punished for the way he sought and found death at the battle of Plataea. But these punishments were applicable only when the person had killed himself without having previously asked permission of the proper authorities. At Athens, if he asked

authority of the Senate before killing himself, stating the reasons which made life intolerable to him, and if his request was regularly granted, suicide was considered a legitimate act. Libanius reports some precepts on the matter, the period of which he does not state, but which were really enforced at Athens; besides, he praises these laws very highly and asserts that they had the desired effects. They read as follows:

> Whoever no longer wishes to live shall state his reasons to the Senate, and after having received permission shall abandon life. If your existence is hateful to you, die; if you are overwhelmed by fate, drink the hemlock. If you are bowed with grief, abandon life. Let the unhappy man recount his misfortune, let the magistrate supply him with the remedy, and his wretchedness will come to an end.

The same law is found at Ceos. It was carried to Marseilles by the Greek colonists who founded the city. The magistrates had a supply of poison, the necessary quantity of which they gave to all who, after having told the Council of the Six Hundred the reasons they thought they had for killing themselves received its authorization.

We are less well informed concerning the provisions of early Roman law: the fragments of the law of the XII Tables which have come down to us do not mention suicide. But since this Code was largely inspired by Greek legislation it probably contained similar provisions. At least, in his commentary on the Aeneid, Servius tells us that according to the laws of the pontiffs, whoever had hung himself was deprived of burial. The statutes of a religious confraternity of Lanuvium prescribed the same penalty. According to the annalist Cassius Hermina, quoted by Servius, Tarquin the Proud, to combat an epidemic of suicides, ordered the bodies of the dead crucified after torture and left a prey to birds and wild beasts. The custom of denying burial to suicides seems to have persisted, at least in principle, for in the Digest one reads: *Non solent autem lugeri suspendiosi nec qui manus sibi intulerunt, non taedio vitae, sed mala conscientia.*

But according to a text of Quintilian until a rather late period there was an institution at Rome similar to the one just mentioned in Greece, intended to modify the severity of the

above provisions. The citizen who wished to kill himself had to submit his reasons to the Senate, which decided upon their acceptability and even determined the kind of death. What makes it probable that some such practice really existed at Rome is that something like it survived in the army even under the emperors. The soldier who tried to kill himself to avoid service was punished with death; but if he could prove that he was impelled by some plausible reason, he was only dismissed from the army. If, finally, his act was one of remorse for some military fault, his will was annulled and his property reverted to the public treasury. There is certainly no doubt that at Rome consideration of the motives leading to suicide always played a preponderant role in the moral or judicial estimation of it. Hence the precept: *Et merito, si sine causa sibi manus intulit, puniendus est: qui enim sibi non pepercit, multo minus aliis parcet.* The public conscience, while reproving it as a general rule, reserved the right to authorize it in certain cases. Such a principle is close kin to that which forms the basis of the institution of which Quintilian speaks; and it was so fundamental in Roman legislation concerning suicide that it remained even under the emperors. In time, however, the list of legitimate excuses lengthened. Finally there was practically only one *causa injusta*: the wish to escape the consequences of a criminal sentence. There was even a moment when the law excluding this from tolerance seems not to have been applied.[2]

If from the level of the City-State, we descend to the primitive peoples among whom altruistic suicide flourishes, it is hard to state anything exactly concerning the legislation that may obtain there. The complacency with which suicide is considered there, however, makes it probable that it is not formally forbidden. Yet it is possible that it is not absolutely tolerated in all cases. But however this may be, the fact remains that among all the societies above this lower level, none is known where the individual is unreservedly granted the right to kill himself. In both Greece and Italy, to be sure, there was a time when the old regulations concerning suicide became almost entirely a dead letter. But this was not until the City-State regime itself began to decline. This belated tolerance cannot be referred to as an example for imitation; for it is clearly interrelated with the serious disturbances which then

afflicted these societies. It is the symptom of a morbid condition.

Such general reprobation, except for these cases of retrogression, is even in itself an instructive fact which should check moralists too much inclined to indulgence. An author must have great faith in the strength of his logic to venture such a revolt, in the name of a system, against the moral conscience of humanity; or, if he considers the prohibition of suicide founded on the past and advocates its abolition only for the immediate present, he should first prove that some profound change in the basic conditions of collective life has occurred recently.

A more striking conclusion springs from our sketch, practically excluding the possibility of such a proof. Regardless of differences in detail in repressive measures of different peoples, legislation on the subject clearly passed through two chief phases. In the first, the individual is forbidden to destroy himself on his own authority; but the State may permit him to do so. The act is immoral only when it is wholly private and without collaboration through the organs of collective life. Under specific circumstances, society yields slightly and absolves what it condemns on principle. In the second period, condemnation is absolute and universal. The power to dispose of a human life, except when death is the punishment for a crime,[3] is withheld not merely from the person concerned but from society itself. It is henceforth a right denied to collective as well as to private disposition. Suicide is thought immoral in and for itself, whoever they may be who participate in it. Thus, with the progress of history, the prohibition, instead of being relaxed, only becomes more strict. If the public conscience seems less assured in its opinion of this matter today, therefore, this uncertainty may rise from fortuitous and passing causes; for it is wholly unlikely that moral evolution should so far reverse itself after having developed in a single direction for centuries.

The ideas that set it in this direction are in fact still alive. It has occasionally been said that if suicide is and should be forbidden, it is because a man evades his obligations towards society by killing himself. But if we were moved only by this thought we, like the Greeks, should leave society free to

abrogate a prohibition issued only for its own benefit. If we refuse it this authority, it is because we see in the suicide more than an unscrupulous debtor to society. A creditor may always remit a debt by which he benefits. Besides, if this were the only reason for disapproving suicide, the reprobation should be more formal the more strictly the individual is subject to the State; so that it would be at its height in lower societies. On the contrary, its rigour increases with the growth of individual as contrasted with State rights. If it has become so formal and severe in Christian societies, this is not because of the idea of the State held by these people because of their new conception of the human personality. It has become sacred, even most sacred in their eyes, something which no one is to offend. Of course, even under the City-State regime the individual's existence was no longer as self-effacing as among primitive tribes. Then it was accorded a social value, but one supposed to belong wholly to the State. The City-State could therefore dispose of him freely without the individual having the same right over himself. But today he has acquired a kind of dignity which places him above himself as well as above society. So long as his conduct has not caused him to forfeit the title of man, he seems to us to share in some degree in that quality *sui generis* ascribed by every religion to its gods which renders them inviolable by everything moral. He has become tinged with religious value; man has become a god for men. Therefore, any attempt against his life suggests sacrilege. Suicide is such an attempt. No matter who strikes the blow, it causes scandal by violation of the sacrosanct quality within us which we must respect in ourselves as well as in others.

Hence, suicide is rebuked for derogating from this cult of human personality on which all our morality rests. Proof of this explanation is the difference between our view and that of the nations of antiquity. Once suicide was thought only a simple civil wrong committed against the State; religion had little or no interest in the matter. Now it has become an act essentially involving religion. The judges condemning it have been church councils, and lay power in punishing it has only followed and imitated ecclesiastical authority. Because we have an immortal soul in us, a spark of divinity, we must now

be sacred to ourselves. We belong completely to no temporal being because we are kin to God.

But if this is why suicide has been classed among illicit actions, should we not henceforth consider the condemnation to be without basis? It seems that scientific criticism cannot concede the least value to these mystical conceptions, nor admit that man contains anything whatever that is superhuman. Reasoning thus, Ferri in his *Omicidio-suicidio* thought himself justified in regarding all prohibitions of suicide as survivals from the past, doomed to disappear. Considering it absurd from the rationalist point of view that the individual could have an extra-personal aim, he deduces that we are always free to renounce the advantages of community existence by renouncing life itself. The right to live seems to him logically to imply the right to die.

But this method of argument draws its conclusion too abruptly from form to content, from the verbal expression through which we translate our feeling to the feeling itself. It is true that, both intrinsically and abstractly, the religious symbols by means of which we explain the respect inspired in us by human personality are not adequate to reality, and this is easily provable; but from all this it does not follow that this respect is itself unreasonable. On the contrary, its preponderant role in our law and in our morality must warn us against such an interpretation. Instead of taking a literal interpretation of his conception, let us examine it in itself, let us discover its make-up, and we shall see that in spite of the crudeness of the popular formula the conception nevertheless has objective value.

Indeed, the sort of transcendency we ascribe to human personality is not a quality peculiar to it. It is found elsewhere. It is nothing but the imprint of all really intense collective sentiments upon matters related to them. Just because these feelings derive from the collectivity, the aims to which they direct our actions can only be collective. Society has needs beyond our own. The acts inspired in us by its needs therefore do not depend on our individual inclinations; their aim is not our personal interest, but rather involves sacrifices and privations. When I fast, when I accept mortification to be pleasing in God's sight, when I undertake some inconvenience

out of respect for a tradition the meaning and import of which are usually unknown to me, when I pay my taxes, when I give any labour or life to the State, I renounce something of myself; and by the resistance offered by our egoism to these renunciations, we readily see that they are forced from us by a power to which we have submitted. Even when we defer gladly to its commands we feel that our conduct is guided by a sentiment of reverence for something greater than ourselves. However willingly we obey the voice dictating this abnegation, we feel sure that its tone is imperative beyond that of instinct. That is why we cannot indisputably consider it our own, though it speaks within our consciences. We ascribe it to other sources, as we do our sensations; we project it outside of ourselves, referring it to an existence we think of as exterior and superior to ourselves, since it commands us and we obey. Of course, whatever seems to us to come from the same origin shares the same quality. Thus we have been forced to imagine a world beyond this one and to people it with realities of a different order.

Such is the source of all the ideas of transcendency which form the bases of religions and morals; for moral obligation is explicable only in this way. To be sure, the definite form in which we usually clothe these ideas is without scientific value. Whether we ascribe them to a personal being of a special nature or to some abstract force which we vaguely hypostasize under the title of moral ideal, they are solely metaphorical conceptions, giving no adequate explanation of the facts. But the process which they symbolize is none the less real. It remains true that in every case we are urged to act by an authority exceeding ourselves, namely society, and that the aims to which it attaches us thus enjoy real moral supremacy. If so, all the objections applicable to the common conceptions by which men have tried to represent this sensed supremacy to themselves cannot lessen its reality. Such criticism is superficial, not reaching to the basis of things. If it is demonstrable that exaltation of human personality is one of the aims pursued, and which should be pursued by modern societies, all moral regulation deriving from this principle is justified by that fact itself, whatever the manner of its usual justification. Though the reasons satisfying the crowd are open to criticism,

they need only be transposed into another idiom to be given their full import.

Now, not only is this aim really one of the aims of modern societies, but it is a law of history that peoples increasingly detach themselves from every other objective. Originally society is everything, the individual nothing. Consequently, the strongest social feelings are those connecting the individual with the collectivity; society is its own aim. Man is considered only an instrument in its hands; he seems to draw all his rights from it and has no counter-prerogative, because nothing higher than it exists. But gradually things change. As societies become greater in volume and density, they increase in complexity, work is divided, individual differences multiply,[4] and the moment approaches when the only remaining bond among the members of a single human group will be that they are all men. Under such conditions the body of collective sentiments inevitably attaches itself with all its strength to its single remaining object, communicating to this object an incomparable value by so doing. Since human personality is the only thing that appeals unanimously to all hearts, since its enhancement is the only aim that can be collectively pursued, it inevitably acquires exceptional value in the eyes of all. It thus rises far above all human aims, assuming a religious nature.

This cult of man is something, accordingly, very different from the egoistic individualism above referred to, which leads to suicide. Far from detaching individuals from society and from every aim beyond themselves, it unites them in one thought, makes them servants of one work. For man, as thus suggested to collective affection and respect, is not the sensual, experiential individual that each one of us represents, but man in general, ideal humanity as conceived by each people at each moment of its history. None of us wholly incarnates this ideal, though none is wholly a stranger to it. So we have, not to concentrate each separate person upon himself and his own interests, but to subordinate him to the general interests of humankind. Such an aim draws him beyond himself; impersonal and disinterested, it is above all individual personalities; like every ideal, it can be conceived of only as superior to and dominating reality. This ideal even dominates

societies, being the aim on which all social activity depends. This is why it is no longer the right of these societies to dispose of this ideal freely. While we recognize that they too have their reasons for existence, they have subjected themselves to the jurisdiction to this ideal and no longer have the right to ignore it; still less, to authorize men themselves to do so. Our dignity as moral beings is therefore no longer the property of the City-State; but it has not for that reason become our property, and we have not acquired the right to do what we wish with it. How could we have such a right if society, the existence greater then ourselves, does not have it?

Under these conditions suicide must be classed among immoral acts; for its main principle it denies this religion of humanity. A man who kills himself, the saying goes, does wrong only to himself and there is no occasion for the intervention of society; for so goes the ancient maxim *Volenti non fit injuria*. This is an error. Society is injured because the sentiment is offended on which its most respected moral maxims today rest, a sentiment almost the only bond between its members, and which would be weakened if this offence could be committed with impunity. How could this sentiment maintain the least authority if the moral conscience did not protest its violation? From the moment that the human person is and must be considered something sacred, over which neither the individual nor the group has free disposal, any attack upon it must be forbidden. No matter that the guilty person and the victim are one and the same; the social evil springing from the act is not affected merely by the author being the one who suffers. If violent destruction of a human life revolts us as a sacrilege, in itself and generally, we cannot tolerate it under any circumstances. A collective sentiment which yielded so far would soon lose all force.

Of course, this does not mean that we must revert to the ferocious penalties imposed on suicide during the past centuries. They were established at a time when, under the influence of temporary circumstances, the entire system of public repression was enforced with excessive severity. But the principle that homicide of one's self should be reproved must be maintained. It remains to determine by what external

tokens this reprobation is to be shown. Are moral sanctions enough or must there be juridical ones, and if so, what? This is a question of application. . . .

NOTES

1 See *De la Division du travail social*, Introduction.
2 Towards the end of the Republic and the beginning of the Empire.
3 And even in this case the right of society is beginning to be disputed.
4 See my *De la Division du travail social*, bk II.

CHAPTER 6

The Origins of Law

I GASTON RICHARD'S 'ESSAI SUR L'ORIGINE DE L'IDÉE DE DROIT'

It is still quite generally believed in France that there are and can only be two sorts of ethics, between which the moralist is compelled to choose; that the only means of escaping utilitarianism is to resort to the apriorism of the metaphysicians. It seems that from the moment that one employs the observational method, one is necessarily condemned to denying the reality of duty and that of disinterestedness, that is to making pure illusions of both of them. The book under review is before all else a protest against this preconception; it is a vigorous effort to open a new pathway in legal ethics and legal philosophy and it is this which makes for the novelty and interest of the work. M. Richard, indeed, combats with the same fervour both the utilitarians' and the metaphysicians' doctrines; both seem to him equally incapable of explaining the law as a duty, and for the same reason. For these two hostile brethren are less far apart from each other than is ordinarily believed; both teach as a matter of fact an almost identical individualism. The utilitarian is an individualist since he makes self-interest the sole end of conduct; but the metaphysician is no less so, since his ethics consist in an apotheosis of the individual personality. Perhaps, it is true, one might reproach the author for passing too lightly over some great metaphysical doctrines, like Hegelianism, which if anything have erred by excess of the opposite sort. Even

Source I: Durkheim, E. Review of Gaston Richard's 'Essai sur l'Origine de l'Idée de Droit', *Revue philosophique*, 35 (1893), pp. 290–96. Translated by Andrew Scull.

Kantianism, which M. Richard has more particularly in mind, partly escapes individualism, because it subjects the individual to a law which the individual did not make, to an objective rule, to an imperative and impersonal order. However, it is incontestable that this impersonal ideal is nothing else than the individual in abstract and idealized form. Now, following M. Richard, an individualistic doctrine could not then be the basis of law; for judicial practice cannot dispense with charity. The dogma of egoism, whether it be that of the utilitarians or that of the metaphysicians, deprives the notion of duty of all content; for duty above all consists of giving oneself, sacrificing oneself, resigning oneself. Consequently, by the same token, it is the ruination of law which can only be the logical and even physical condition of duty (p. xii).

What gave birth to the individualist error, was that empiricists and apriorists studied the idea of law in the abstract, detaching it from the circumstances which had determined its formation and development. They did not see that it was the act of living in society which led men to define their juridical relations, to fix 'what all may require from each and what each may expect from all'. In a word, the philosophy of law cannot be separated from its sociology. The problem as our author poses it may therefore be formulated in this way: What are the social influences which gave rise to the idea of the law and in terms of which it has evolved historically?

Now, when the question is posed in these terms, one thing is immediately obvious: the idea of law is not a simple one. It is made up of elements, each of which must be studied in turn.

The first of these elements is the idea of arbitration. As a matter of fact, the first codified customs are only collections of arbitration awards; it is moreover easy to understand how the institution of arbitration must have developed very early on, as soon as societies came into being. In every individual *conscience* there exist two muted states of consciousness, susceptible, when the opportunity offers, of being transformed into clear ideas. 'One is the conception of social goals, i.e., of a mutual protection against the causes of destruction' (p. 4) whether they have a human or a material origin; the other is the sense of a committed struggle between the individual appetites of the very members of the group. These two propensities are

opposed to one another. Consequently, if the first is strong enough, it will keep the second in check and ward off its excesses. It will prevent conflicts from degenerating into open warfare, inducing men to refer the object of their disagreement to an arbiter; the latter, moreover, will be determined to intervene for the same reason, i.e., under the pressure of the suffering which his sympathetic feelings occasion him at the sight of the conflict which has arisen. Arbitration is thus an immediate result of sociability, and even a quite rudimentary sociability suffices to produce it.

But for law to exist, it is not enough for there to be arbitration, this arbitration must also be guaranteed to the victim, i.e., he must always have the right to have recourse to it without the guilty party being able to abridge it. This guarantee is distinct from arbitration, for it has not always accompanied it historically. 'Primitive societies' courts of justice do not give executory force to their judgements; the parties are not even obliged to refer their litigation to them' (p. 25). We are therefore in the presence of a new component of the idea of law, the idea of guarantee.

But what could have led me to arrange this guarantee? This question, according to M. Richard, has, until now, wrecked the applied philosophy of law. These philosophers, as a matter of fact, have generally believed that only an external apparatus of coercion of conventional origin could have produced this result. Thus a self-interested calculation would have taught humanity to prefer the evil of submission and discipline to the more formidable evils of universal and interminable warfare. But it is not true that man is a utilitarian being. 'Calculation is not the author of history.' Besides, the state of anarchy has never been the object of horror for mankind that Hobbes assumes; for many races have never left it. We must pursue the opposite approach. It is within the *conscience* and not outside it, it is in the sympathetic and altruistic states of mind and not in the selfish feelings that we must look for the solution to the problem. Society compels the defendant to yield and protects the victim, because it feels itself responsible for the latter. The broad sympathy which it feels for each of its members does not allow it to witness unmoved damage suffered by one of them; moreover, it is conscious that the

harm which he suffers could not be spread without danger for society itself. It therefore espouses quite naturally a cause which is its own. For this to happen, it need not be organized as a State; it suffices that the individuals who compose it feel linked together in the struggle for existence. It is this quite internal feeling which secures the *guarantee* and not, as the utilitarians have believed, an external and artificial coercion. The State, once constituted, can render more regular the carrying out of this guarantee; but it does not create it. It has its roots in the very *conscience* of societies.

But the idea of arbitration and that of guarantee imply that of offence; for the guarantee is a protection and, in consequence, presupposes a threat or an assault. It follows then from the preceding analysis that the idea of offence is one of the elements which serve to make up the idea of law and, consequently, is anterior to it. This conclusion, to begin with, upsets received ideas. We are used to considering an offence as the violation of the law and, in consequence, the law as anterior to the offence. But this is, according to M. Richard, to invert the real order of facts. If, he says, the mind suppresses the offence, then charity and sympathy will hold sway unimpeded and unalloyed; there will consequently be nothing to guarantee and the law will not be born. For the law to be possible, sociability must exist, but it must also be disturbed in a partial and intermittent manner. If it is entirely absent, a state of war exists; if it is perfect, there is no conflict.

The only thing is, if the notion of law depends upon that of offence, where does the latter come from and upon what does it rest? The author rejects both the theory which makes the offence the creation of the legislator, and that which simply sees it as a particularly harmful action. The offence is a natural thing which has its roots in the very constitution of society and not in the fickle will of statesmen; on the other hand, offence and harm are distinct things. A false deed, a bankruptcy are often more terrible calamities than a murder and yet do not have the same criminological importance. What constitutes the offence is that it manifests the absence of altruistic dispositions. 'The radical crime is absolute selfishness, the desire to live for oneself alone, to take cognizance only of one's own goals in the world' (p. 68). We can see that this solution

is not very far from the one M. Garofalo has proposed; it is distinct from it, however. By altruistic dispositions, M. Richard comprehends not only honesty and justice, but filial piety, national feeling, sense of decency, the sentiment of honour, etc. His definition is thus wider than that of the Italian criminologist, and accounts better for the facts. Then again, it permits the linking up of the offence with the fundamental conditions of social life; for, in order for egoism to be detested, there is no necessity that the legislator intervene, it is sufficient that there is a coherent society conscious of its unity. If, among primitive peoples, the conception of offence is more obscure than among civilized nations, this is because altruism is more imperfect there; but it does not have a different character and does not depend upon other causes.

Thus we see forming little by little the idea of law. The starting point is society's intervention in the settlement of conflicts; from there come arbitration and the guarantee. The definition of offence has shown us what rule society follows in the settlement of conflicts; it fights against egoism, it represses insociability. But by what means? It is necessary to answer this question for the notion of the law to be completely specified.

In point of fact, society makes use of two methods to attain its goal. It obliges the culprit to make amends for the harm he has caused; beyond this, at least in some instances, it imposes a punishment on him. The idea of punishment and that of reparation seem, at first sight, very different; but the author reduces them to a unity; he sees here only two different forms of the idea of debt. Penal repression and compensation appear to him, indeed, to be both derived from the custom of the composition which was the original practice. Now composition is compensation for the damage caused by the crime; it is a debt contracted by the criminal, simply by virtue of his offence. When the custom of composition disappeared, it was replaced by the obligation on the part of the culprit to make amends for the harm he had done. Even the obligations which are born of the contract were derived from the same source. In an interesting passage, the author shows that the law of contract, far from having been the primordial fact of juridical life, as certain theorists have claimed, is, on the contrary, a

simple extension of the criminal law. We believe it is beyond all question, indeed, that the latter has been the germ from which issued all of the law.

As for punishment, it too is a debt, but in another sense. It corresponds to the debt of security which society owes to its members. On the one hand, crime gives rise to a resentment on the part of the whole community against the criminal and, consequently, to a need for vengeance. Now collective vengeance is no less contrary than private vengeance to the notion of guarantee; it is a disturbance of order. Society is therefore obliged to protect the criminal himself against its own anger. But on the other hand, it is no less obliged to protect itself against aggression. Hence there arises the institution of punishment. We see the connections which it sustains with the composition: the one is the substitute for private vengeance; the other, for public vengeance.

These are the four elements which united, fused together, form the notion of the law. This notion appears to the layman to be perfectly simple and indivisible. We see that, in reality, it is extremely complex. This illusion stems from the fact that the parts of which it is formed have agglutinated, that some of them have even disappeared from the field of consciousness; a whole chapter, the eighth, is devoted to describing the psychological process from which this simplification arises. But however complex this idea may be, it still possesses a unity in this sense that all the elements of which it is composed are impressed with the same character, derived from the same source, namely the idea of social solidarity. This is why the parties submit their conflicts to an arbitrator and why society espouses the cause of the victim; crime is nothing else than an outrage against solidarity, and it is to protect it against individual and collective vengeance that punishment and civil reparation have been instituted. It is thus in truth the soul of the law.

Such is the conclusion of this work where the spirit of observation is assuredly far from absent, but which still seems to us to be distinguished above all by a remarkable dialectical ingenuity. It is not just in the entirety of the account, but better still, in the details of the argumentation that the author's logical qualities are deployed most comfortably. His

arguments hang together, hurry along at so rapid a rate that the reader is swept away, even despite himself. Far from avoiding objections, he seeks them out, raises them against himself with a sort of coquetry; one has the feeling that he takes pleasure in this fencing. Perhaps he even dallies a little and at times pushes ingenuity to the point of affectation. Thus the whole discussion which he institutes to establish the priority of the notion of offence over that of the law seems to us a little over-subtle. In historical reality, the law and violations of the law constitute two orders of concomitant and contemporaneous facts and, in consequence, it is not possible to say that, chronologically, one preceded the other. It can thus only be a question of logical priority; and this is of quite minor importance for the sociologist. What matters for sociology is to know what are the connections which really exist between things, and not those according to which the concepts must be logically arranged. Besides, is the line of argument itself very rigorous? Let us suppose that there are no offences; pure charity holds sway. So be it! But even then, a compulsory form of charity exists, defined by some imperative rules of conduct to which are attached more or less definite sanctions. These rules are therefore juridical; the fact that they are not deviated from does not imply that they do not exist.

This preponderance of the dialectical point of view affects moreover the general design of the book. What the author looks for indeed – as the title already witnesses – is the genesis not *of the law*, but *of the idea of the law*. He seems therefore really to consider the law not as a set of things, of given realities the laws of which must be sought according to the method of the natural sciences, but rather as a system of concepts linked logically among themselves and subordinated to a master concept which in large part contains them. As a matter of fact, such is indeed the nature of the solution propounded. We have seen, indeed, how the idea of debt was involved in that of offence, this in turn in the idea of guarantee, and, finally, the idea of guarantee and arbitration in the idea of solidarity. Doubtless, M. Richard does not suppose that any of these notions, nor accordingly the one which envelopes them, is given to us ready-made. It is built up gradually. But in whatever fashion it takes shape, once it

exists, it would be this which, in developing, would have given birth to the law. The law would only be its realization out of the different conditions of experience. But nothing justifies our believing that the law has been realized in this manner. In order that one might postulate the existence of an idea *of the law, the law* must have existed, or what exists in reality, the laws, which is to say the indeterminate multitude of juridical rules. Each of these is subject to particular causes and answers to special purposes. Far from a single idea having presided at their elaboration, they were born more often than not of fortuitous causes and in an altogether unconscious manner. Collective activity has congealed itself in diverse forms which they determine, without men having been aware of the social necessities to which they were responding. Doubtless, in one sense, this idea has an origin, but there is nothing very obscure about it. It stems, in fact, from the very spectacle of the juridical rules which takes place before our eyes; so far from having pre-existed it, it results from the law. It dimly reflects the juridical life itself, it does not create it; in just the same way as our idea of the world is only a reflection of the world in which we live. It does not express, therefore, the essence of the things it represents. It is permissible, it is true, to search for this essence. There are, at least one may believe, among the varieties of juridical rules, some common, and in consequence, essential characteristics. But only an already advanced knowledge of the law could furnish us with the conception of it. It is thus not this conception which could have been the germ from which the law emerges.

But if we rid the doctrine of this logical apparatus, an extremely interesting idea emerges which, we think, ought to be retained. It is customary to distinguish justice, that is to say the law, from charity. The first would be the elementary basis of morality and the second would be like the crowning point. M. Richard shows that on the contrary, these theories reverse the natural order of things, and that charity is the foundation of the law. Perhaps, it is true, the reason he gives for this is not completely convincing. Charity, he says, is the soul of the law, because the law is born of our feeling of solidarity against war. But we only feel this solidarity towards the unjust war, towards the attack which injures recognized rights. This

solidarity thus presupposes that there already exists a form of justice, that the constitution of the law had been previously determined. Could this determination develop independently of all sentiment of solidarity, and could the latter only arise to assure the defence of rights, once they were established? Then the old theory would be in large part correct and would account for the most important facts. But none of this is so. The rights of each have only been defined thanks to mutual concessions and sacrifices; for what is in this fashion accorded to some is necessarily given up by others. The right which I concede to others of keeping the fruits of their labour implies that I renounce the option of seizing these. The law thus results from a mutual limitation of our natural powers, a limitation which can only develop in a spirit of understanding and harmony.

II THE ORIGINS OF PENAL LAW

In our analysis of this article, we can only deal with doctrines, and we must leave aside the numerous and well studied facts on which they are based. However, it should be pointed out that the article is given additional interest by its happy use of Russian sources. The author wishes to correct on two points the common theory which sees the origin of punishment in vengeance.

1. The vengeance of one group against another only indirectly contributed to the formation of penal law. Vengeance is not a punishment; it is modern warfare that it resembles. It was not able to transform itself into punishment since everywhere it tends to give rise to composition, that is, to damages. The offender's group always takes up the cudgels on his behalf, and this precludes any judgement of the legitimacy or illegitimacy of his act. If perchance some groups do not make common cause with those of their members who have

Source II: Durkheim, E. Review of E. Kulischer's 'Untersuchungen über das primitive Strafrecht' (Research on primitive penal law), *Zeitschrift für vergleichende Rechtswissenschaft*, XVI (1904) Bd., 1–11., pp. 1–22. In *L'Année sociologique*, 8, pp. 460–3. Translated by Steven Lukes and W. D. Halls.

harmed other groups under certain conditions, this can only be a secondary phenomenon. Indeed, for them to derive any advantage from this, the State must already have relieved them of all responsibility, having stipulated that they break all links with those of their members who have committed acts of aggression and that they abandon them to the vengeance of their victims. In the absence of such an intervention from above, the principle of joint responsibility would expose them to vengeance, whatever their attitude might be towards the real authors of the aggression. It is only when independent groups have been forced, in particular to defend themselves against a common enemy, to come together and to maintain peace amongst themselves, that a group has been able to repress an attack by one of its members against another group or consider as a legitimate punishment the vengeance exercised by the latter. It is not the attack in itself that it condemns, it is the 'breaking of the peace', which would involve it in a dangerous war against its neighbour or would oblige it to pay composition if it wished to avoid this. For the murder of a stranger to be evaluated as a crime, this murder had to be injurious to the sole good that was common to several groups, that is to say established peace.

2. The reaction by which a group responds to crimes committed by one of its members does not have the character of vengeance. These crimes, quite distinct from acts of war which evoke blood vengeance, are principally treason, incest, sacrilege and the murder of kin, which is in no way a form of murder in general, but something quite different: they never entail either vengeance or composition. If the most ancient legal documents do not mention them, this is not however because they were tolerated: but the most ancient codes are veritable international treaties, concluded by sovereign groups in order to ensure peace; they are therefore only concerned with those acts which involve the relations of one group to another and which in consequence could threaten peace; the administration of justice within each group did not interest them. The sanction of crimes committed within a group and against it consist in proscription, excommunication. All the members of the group are united amongst themselves by a

close sympathy: that is the necessary condition of success in the constant struggle for existence. Thus is explained the fact that, in certain less advanced societies, the murder of a kinsman remains unpunished: sympathy for the murderer himself is too strong there for him to be touched. But in most cases it is partially neutralized by the sympathy the victim inspires and even more by the feeling of danger which is aroused by internal dissensions, in a groups always menaced by the enemy from without. It remains, nonetheless, too intense for the murderer to be killed as one kills a stranger; but it is sufficiently diminished for one no longer to wish to have anything to do with him and thus no longer tolerate his presence.

Proscription manifests at the same time the horror which the murder arouses and the fellow-feeling which is still attached to the murderer. Texts show us that very often one does not believe oneself authorized to kill him, as an enemy; one would regard oneself as committing a fresh crime. And when one makes up one's mind to do this, one seeks by a sort of fiction to avoid it being a crime. For example a mode of execution is chosen which brings about death only indirectly, or which does not allow the offence to fall on one person alone (stoning); the execution is entrusted to a slave; it is preceded by an excommunication which renders the guilty party a stranger, an enemy. But in all these cases, as well as in those where the proscribed person, in the absence of protection and resources necessarily dies, what essentially characterizes the social reaction is that it consists in a proscription. The group which reacts does not in most cases have the intention of killing the guilty party, and it never considers itself as having or duty to do so. Capital punishment has historically derived from the *Friedloslegung*; nevertheless the latter is in no way, in principle, a capital punishment, a mode of execution. What is essential to it is the violent and definitive expulsion of the guilty party from residence within the group and all relations with its members are henceforth forbidden. This is why it very generally involves the destruction of the house of the proscribed party and of his property. It is probably to the crime of treason that capital punishment, properly so-called, in substitution for proscription, has been applied. For the traitor in

effect proscription does not entail the need to live outside all society without any protection, since he naturally receives the hospitality of the enemy group which has profited from his crime: it therefore does not affect him. Only in the case of treason would primitive societies therefore have been led to put to death one of their members themselves.

We have serious reservations about the theories of M. Kulischer, notably on two points. In the first place, all the difficulties which the study of the sanction of murder within the group raise are far from being clarified: how can one explain that, in societies of apparently closely related types, the murder of a kinsman sometimes entails a rigorous proscription and sometimes remains without any sanction? The skill with which M. Kulischer groups together facts must not let us forget that the problem has aspects which he neglects. In the second place, we believe that crimes properly so-called – acts which provoke a reaction by the group against one of its members – have an essentially religious character which determines the equally religious sanction, namely excommunication. In this respect alone, M. Kulischer's theory, which explains proscription by a diminution of sympathy, appears to us as retrograde when compared with the more complex conceptions of the religious origins of punishment which are in the process of being established.

With these reservations, however, M. Kulischer's article still shows powerfully that punishment has its origins, not in vengeance, but in the reaction of the group against its members, and that he undertakes, with more care than anyone to date has shown, the study of this reaction. It is from the same principle that the ideas that we have expressed in the *Année sociologique* since its origins are derived. But although this principle has already inspired studies which we have reviewed, (*Année sociologique*, I, p. 353; V, p. 400) M. Kulischer's work is in this respect the most important which we have had to report.

CHAPTER 7

The Nature and Origins of the Right of Property

I

What should we understand by 'right of property'? What does it consist of? How is it recognized? We can see that a solution to the initial problem will make it easier to examine the causes.

The definition we are seeking has to express the right of property in a general sense, that is, allowing for the particular forms it may have taken in different ages and countries. We should first try to get at the essence of this right, or what is common to the various ways in which it has been conceived.

The idea of property first evokes the idea of a thing. There seems to be a close connection between these two notions: that one can only possess things, and that all things can be possessed. Undoubtedly, in the present state of our ideas, we find it repugnant to admit that the right of ownership may be exercised over objects other than things. At the same time, we have to include animals within the term of things, since they may be as absolutely possessed as inanimate things. But this limitation is comparatively recent. As long as slavery existed, slaves were the subject of a 'real right' that cannot be distinguished from the right of property. The slave stood to his master in the same relation as his fields or his beasts. In some respects it was the same thing with the son of the family, at least in Rome. Except in the matter of his civic commitments, he was considered as an object of ownership or chattel. In ancient times he could be ransomed. Now, the *rei vindicatio* applied only to things that formed a citizen right of ownership, that is, to corporeal property *in commercio*. In the classical era,

Source: Durkheim, E. *Professional Ethics and Civic Morals* (Routledge & Kegan Paul, 1957). Translated by C. Brookfield.

the father could still dispose of him validly as property and until the time of Justinian he could be the object of a *furtum* or theft. The notion of this disposal of property and of *furtum* must needs imply a thing subject to the right of property.

Conversely, there are things which are not the object of any kind of right of property. Such were formerly the sacred things, known in Rome as the *res sacrae* or *religiosae*. The sacred things were in fact outside any transactions, absolutely inalienable and could not become the object of any real right or any obligation whatever. They were not owned by anyone. It is true we might say, and it was said, that they were the property of the gods. But the effect of this very formula is that they did not constitute human property, and we are concerned here with the right of ownership exercised by men. This attributing of the sacred things to the gods was in reality only a way of declaring that they were not and could not be appropriated by any man. But that particular feature is not confined to this category alone. There was also what was called in Rome the *res communes*, that is, things which belong to no one because they belong to all and by their nature elude any appropriation: the air, springs and streams and the sea. Everyone may use them, but no individual or group can be pointed to as the owner. There exists today what is called property under public ownership – roads, highways, streets, the banks of rivers that are navigable or used for timber rafts and the shores of the sea. All these forms of property are administered by the State but they are not owned by it. Everyone makes free use of them, including foreigners. The State that manages them has no right to part with them; it has to carry out obligations connected with them but has no right of property over them.

What emerges from these facts is that the range of objects liable to appropriation is not necessarily settled by their natural composition but by the law of any nation. It is public opinion in every society that makes some objects regarded as liable to appropriation and others not: it is not their physical nature as natural science might define it, but the form their image takes in the public mind. A certain thing which yesterday could not be appropriated, may be so today and vice versa. Hence it follows that the nature of the entity

appropriated cannot come within our definition. We cannot say that it should consist of something corporeal that is perceptible by the senses. There is no reason why incorporeal things may not admit of appropriation. *A priori*, no limits can be set to the power the collectivity has to endow anything that exists with the qualities requisite for juridical appropriation, or to take away those qualities. If I use the term 'thing' in what follows, it is in a sense that is strictly indeterminate and without wishing to prove the particular nature of the thing.

One may say the same of the subject or individual who possesses. True, it is usually a man or men who own property. But in the first place, it may be sometimes a group or perhaps a legal entity like the State, the *commune* or the family, in so far as the ownership is a collective one. So it is not only a man who has been able to own property. For long ages, only the individual member of every society could exercise this right. The range of persons qualified to own is decided by the laws of each country, as is the range of things qualified to be owned. Therefore all that we can define is the nature of the links that bind the thing appropriated to the subject or individual who appropriates it, and leaving out of account all that goes to make up the characteristics of both. Of what do these links consist, and what are their distinctive features?

At first glance it might seem that the most natural course would be to look for these features in the nature of the powers in the hands of the individual who possesses, in respect of the thing possessed.

By legal analysis, these powers have long since been reduced to three: the *jus utendi*, the *jus fruendi*, and the *jus abutendi*. The first is the right to make use of the thing as it is – to live in a house, to ride a horse, to walk in a forest, and so on. . . . The *jus fruendi* is the right to the yield of the thing, the produce of the trees or the soil, the interest on a sum of money owned, the rent of a house, etc. . . . As we can see, there is only a shade of difference between the two. Both consist in the power of making use of the thing without altering its nature materially or juridically, that is, without modifying its physical composition or its legal status. It is this latter power that is implied in the *jus abutendi*. By this we mean the faculty of transforming the thing and even of destroying it, whether it be by

consuming it or otherwise, or again, of disposing of it to another or of changing its legal status. Does the setting out of these various powers reveal a true picture of the right of property?

In the first place, the power to make use of the thing is so little characteristic of this right that it may be exercised over things that do not admit of appropriation. I use air, water, all that is common property, and yet I do not own them. In the same way, I make use of highways, streets, rivers and so on . . . without owning them. I may pick fruit from trees that overhang the roads or that grow in the State forests without their being my property. In other words, the right of usage of a thing or of what it yields implies only that the thing in question has not been previously appropriated by another, but does not assume in any way that I have appropriated it. But then, what right of usage are we discussing? Is this an unlimited right? Should we say that the owner can make use of a thing as he pleases, without any limit being set? There is no country in which such freedom from limitation has been recognized or given sanction by law. The right of usage is always clearly defined and limited. There are regulations covering many things, such as getting in the crops, to which the proprietor is obliged to conform. In earlier times, it was strictly prohibited to carry the grain crops or harvest the vineyards before the appointed day, and the way this had to be carried out was also laid down. The right of usage of his property and its yield is extremely limited and yet is indeed the right of that owner. The same thing applies to the married woman who is the owner of her dowry, in respect of the substance and what it yields.

We might say the same about the *jus abutendi*, that is the right of disposal by . . . or otherwise . . . . It may be exercised by people other than the proprietor. Any powers of management imply a power of disposal. The family council[1] or legal guardian may alienate or transform the property of a minor or an incapacitated person; they are not the owner of the property; and this applies also to the powers of the husband concerning the property of his wife. Very often the right of ownership in no way implies the right to alienate. For centuries the family patrimony has been inalienable: so long as

the right to bequeath by will was not admitted, the rights of the head of the family to alienate his possessions were limited: he could not dispose of them freely by will. Nowadays his rights in this respect are still limited in most countries. The donations *inter vivos* which he was able to make have even been revoked by a number of laws in the case of surviving legitimate children. Real estate included in a dowry cannot be disposed of or mortgaged by the husband or by the wife – (although she be the owner), except in certain cases fixed by law. And this in alienability is so much in the interest of the wife that it allows of certain deeds being revoked, once the marriage is dissolved. The rights of one who has come of age but has a legal guardian are equally limited in this respect. What is most striking is the severe limitation set to all proprietary rights accorded to an owner. This is most clearly seen in their not being left to his discretion: he cannot preserve the rights in full unless he makes use of them in a certain way. The spendthrift, that is, one who makes use of his means irresponsibly, who dissipates and jeopardizes them, has their management and even enjoyment taken from him.

Thus, the power of use and enjoyment is found also in cases where there is no right of ownership. The power of disposal may be almost complete, without the right of ownership being thereby extinguished and may be exercised by those other than the proprietor. So that a list of all these rights will not enable us to recognize the characteristics of the right of property. Some of these may be missing, some may be found elsewhere, and all may vary greatly, but the right of property does not vary to the same degree. All that can be said is that wherever this right exists, there is a subject (or individual) who is capable of legally exercising certain powers over the object that is said to be possessed, but without it being possible as a rule to say with accuracy what these powers consist of. They must always exist, but we cannot say exactly what they are. Here, we may find the right of alienation and there it may be lacking; here, the right to alter the nature of a thing, and elsewhere there is none; here the right is fully developed and there it is less so, etc. . . . Seen in these terms, then, they cannot serve our purpose in defining the right of property. For there are some things over which we have

certain powers and which we nevertheless do not possess. A mortgage gives rights over real estate that is mortgaged, but we are still not its owners; any right of management implies a certain control exercised over things, and yet to manage is not to possess.

A clear specification of the powers implicity in property does not enable us to define it. These powers are either too precise, too specialized, or too general. Either they are peculiar to certain forms of ownership or to certain circumstances, or they exist outside of any kind of property. One feature, however, is distinctive. We can make use of things we do not possess and do so legitimately, but when it is a matter of property, it is the owner alone who can use it, whether he be an actual person or a legal entity, an individual or a collectivity. The powers of usage may be either wide or limited, but it is he alone who may exercise them. A thing sover which I exercise the right of property is a thing which serves myself alone. It is a thing withdrawn from common use for its use by a given subject. I may not have unrestricted enjoyment of it but no one other than myself can enjoy it. A legal guardian may be appointed who will supervise and plan the way in which I make use of it, but no one can be substituted for myself, to use it in my place. Or again, if there are ten of us to make use of a thing, this means that there are ten owners. To this it will be objected that there is such a thing as usufruct. Any one having this life interest does indeed enjoy the thing but is not its owner. But what is the element that makes the owner be its owner if it is not that he is destined to enjoy it one day? Withdraw this right of eventual enjoyment and you leave him with nothing. A man is said to own landed property; this means that he is legally entitled to make use of the estate from a specified date. To sell the landed property is to sell the legal entitlement, which is still latent so long as the usufruct is exercised, but which must one day become active. Here then we really have two owners: one who has enjoyment at present, and the other who will have enjoyment later, but with this difference – that the rights of the first must be exercised in such a way as to reserve the rights of the second for a later date. This is why he may not alter the nature of the landed property which is the very condition on which the right

depends. It is said nowadays that the right of usufruct is the outcome of a breaking up of the right of property; it might be more accurate to say that it is the result of a splitting up of this right in the course of time.

There is one thing we must not lose sight of – that the enjoyment in itself is not the distinguishing feature of property. There must be exclusive possession. All other individuals must be prohibited from enjoying the use of the object in question. The right of property consists in essence in the right to withdraw a thing from common usage. The owner may use it or not use it; that is a minor consideration. But its basis in law is to prevent others from using it and even from approaching it. The right of property can be far better defined negatively than in terms of positive content, by the exclusion it involves rather than the prerogatives it confers.

One reservation must be made, however. There is one particular entity which, in certain conditions anyway, can make use of things appropriated by individuals: this is the collective entity represented by the State. The State can in fact, by way of requisition, compel the individual to place the thing owned by him at its disposal. It can even compel him to relinquish it entirely by means of expropriation on grounds of public utility, and the lesser organs of the State, the *communes*, enjoy the same right. It is thus only *vis-à-vis* individuals or private groups that this right of exclusion may be exercised which we have called the distinguishing feature of the right of property. We shall therefore sum up by saying: the right of property is the right of a given individual to exclude other individual and collective entities from the usage of a given thing. The sole exception is the State and lesser organs of the State, whose right of usage can, however, not be exercised except in special circumstances, provided for by law.

This definition will put us on the way to find how the right of ownership came to be established.

Indeed, it follows that the thing appropriated is a thing distinct from common property. Now this feature is also shared by all religious and sacred things. Whenever we have a religious ritual, the world over, the feature that distinguishes the sacred entities is that they are withdrawn from general circulation; they are separate and set apart. The common

people cannot enjoy them. They cannot even touch them. Those who have a kinship, as it were, with sacred things of this kind, can alone have access to them – that is, those who are sacred as they are: the priests, the great, and the magistrates, especially where these latter have a sacred character.

It is these prohibitions that lie at the foundation of what is called taboo, as an institution, that is so common in Polynesia. Taboo is the setting apart of an object as something consecrated, as something belonging to the sphere of the divine. By virtue of this setting apart, it is forbidden to appropriate the object of taboo under pain of sacrilege, or even to touch it. Those alone can have access to it who are taboo themselves or in the same degree as the object. In consequence, there are things which are taboo, forbidden to some but which others may freely make use of. The domain lived in by a priest or a chief was taboo to the common people and could not be made use of by the commonalty, but this very setting apart constituted the full right of property of the owner. Now, although the institution of taboo is especially developed in Polynesia and may be best observed there, it is widely prevalent in other parts. There are only differences of degree between the taboo of the Polynesians and the *sacer* of the Romans. We can see how close the connection is between this concept and that of ownership. Around the thing appropriated, as around the sacred thing, a vacuum formed. All individuals had to keep at a distance, as it were, except those who had the required qualifications to approach it and make use of it. All about us there are objects it is forbidden to use and, almost, to approach, except for those who fulfil certain conditions: since in the case of taboo, the conditions have religious significance, it is extremely likely that in the other, they will be of the same nature. Therefore we are right in supposing that the origins of property are to be found in the nature of certain religious beliefs. Since the effects are identical, they can in all likelihood be attributed to similar causes.

In some cases, we can observe direct the affinity between the notion of the taboo or the sacred and the notion of ownership. The first gives rise to the other. In Tahiti, kings,

princes and the great are sacred beings. Now, the sacred character is in essence contagious: it is communicated to any one who touches the object endued with it. So that a chief can not come in contact with any thing without its becoming taboo by that action, and this in the same degree and the same way as himself. The result is that, *ipso facto*, it becomes his property. In Tahiti, too, personages of this kind go out only when borne on men's shoulders; otherwise they would make the soil taboo and so appropriate it if they touched it with their feet. The connection between the two ideas is such that very often, one serves for the other. To declare a thing taboo or to take possession of it are one and the same. When a diamond mine was discovered near Honolulu the queen declared it to be taboo in order to reserve the ownership to herself. If a piece of land was made over to a foreigner it was declared taboo in order to protect it from any intrusion by the natives. During the harvest or fishing season, the river or fields were declared taboo to protect the yield. The same applied to the forest during the hunting. 'Even ordinary individuals could protect their property by these means. They communicated a sacred character to it or caused this to be done.' (Wurtz, VI, p. 344.) Thus, the taboo ended in becoming a title of possession. Here we see the definite link between taboo and property.[2]

II

We have seen that the right of property could not be defined by the extent of the rights attaching to the owner. These rights are of two kinds. First, there are the rights of disposal (either by means of alienation or by conversion to another form), which seem more especially characteristic of the right of property. Now, there may be no rights of disposal whatever and yet the right of property will not be extinguished. The minor, the person without civil rights, the person who has a legal guardian, can none of them of their own accord dispose of their property, and yet they remain the owners. On the other hand the family council[3] has the power of disposal within certain limits, without however having any right of property over the thing in question. There remains the power

of usage, which, within certain limits, is found wherever there is a right of property. The minor does not have the use of the yield of his property or of the property itself at will, but he has use of it nevertheless in the sense that its yield provides for his upbringing. In this respect there is in fact only a difference of degree between himself and the person who is of age and enjoys his rights in full: the one who is of age, too, cannot make use at will of what he owns, since, if he behaves as a spendthrift he may be deprived of the control of his affairs. All the same, though the power of usage exists wherever there is property, it is not peculiar to it, because it is also to be found in other cases. In particular, anyone may use and use freely, things that are *res nullius*, or those that are *res communes*, that form part of public property, without nevertheless being the owner.

Here we are getting near to what is truly specific in the right of property, if we complete and define this concept of usage by adding to it a distinguishing characteristic. One of the features that identify the right of usage which is peculiar to the owner of all similar rights, is that it excludes any concurrent right. Not only does the owner have use of a thing, but he is alone in that use; or, if there are several simultaneous users, it means that there are several owners. Every owner has the right to remove all other individuals from any thing of his own. The way in which he enjoys what belongs to him is of little importance: the main thing is that no other is able to enjoy it in his place. The thing is withdrawn from common usage for his own personal use. It is this, in part, that lies at the root of the idea of appropriation. However, we have not yet grasped the most fundamental element in this notion. Exclusive usage is to be found in many cases where there are, properly speaking, no rights of ownership: I mean those cases where the right of usage is established in a certain way agreed upon as between a given object and one or more given subjects (or individuals), to the exclusion of all others. The right of usufruct is typical of these rights. The proof that this primary feature is already inherent in the right of property is that the usufruct itself is an element in this right; as a rule it is looked on as the result of a breaking up of the right of property. At this stage, then, we have got into the region of things that have

to be defined: but we have not yet reached the heart of the matter. There is something that still eludes us. Since the owner can co-exist alongside the usufructuary, this means that the right of usage does not form the whole of the right of property. What does the relation consist in, as between the true or bare owner and the thing owned? It is a moral and juridical bond which makes the status of the thing depend on what befalls the person. If he should die, it is his heirs who inherit. In general, there is a kind of moral community between the thing and the person which makes the one have a share in the social life and social status of the other. It is the person who gives his name to the thing or, conversely, the thing that gives its name to the person. It is the person who raises the status of the thing, or it is the thing, the domain, which – if it has privileges deriving from its origin – transmits them to the person. An entailed estate (or *majorat*) involves the transmission of special rights and a title to the inheritor. If we suppose family inheritance to be abolished as from tomorrow, this bond, characteristic of the right of property, would none the less survive; for there would then be a different kind of hereditary transference: it might, for instance, be the society which would inherit and thus the death of the actual owner would continue to affect the social status of the things owned by him.

These, then, are the two constituent elements of the thing appropriated. We are already aware of the likeness they bear to the sacred thing. The sacred thing is closely akin to the sacred person; it is sacred as this person is and in the same degree. The things that are sacred because they are connected with the head of the religion or State are sacred to a higher degree and by a right different from those connected with sacred dignitaries of lesser rank. The taboo of things is parallel with the taboo of persons. All that modifies the sacred status of the person affects the sacred status of the thing, and vice versa. On the other hand, the sacred thing is set apart and withdrawn from common usage and forbidden to all those not entitled to approach it. It does therefore seem as if the thing appropriated were only a kind of particular species of sacred thing.

There is another resemblance between these two kinds of

thing no less characteristic, that shows their fundamental sameness. It is, of course, only another aspect of one of the similarities mentioned. The sacred character, wherever it resides is in its essence contagious and communicates itself to any object it comes in contact with. Sometimes, when the sacredness is intense, a momentary touch is enough to produce this result: if this is only moderate, there has to be a closer and more prolonged contract. But in principle, all that touches a sacred entity, whether person or thing, becomes sacred in the same way as this person or thing. The potency that is within the sacred entity (and which renders it sacred) is seen in the popular imagination as ever ready to spread into all the milieux open to it.

Indeed, it is partly from this fact that the ritual interdictions derive which separate the sacred from the profane; it is a matter of insulating this potency, of saving it from being lost or dissipated or from disappearing. This is why I said that the contagious quality is only another aspect of the insulation that is a feature of sacred things. Again, since the sacred feature, by thus communicating itself, makes the objects to which it is transmitted enter the region of sacred things, we might say that, as a rule, the sacred draws to itself the profane with which it is in contact. How this strange phenomenon arises it is useless to pursue here, all the more so since there is no satisfactory explanation. The truth of the fact is, however, not in doubt; we have only to refer to the instances of contagiousness in taboo, that were described above.

The characteristic that makes a thing the property of a certain subject or individual exhibits the same contagiousness. It tends always to pass from the objects in which it resides to all those objects that come in contact with them. Property is contagious. The thing appropriated, like the sacred thing, draws to itself all things that touch it and appropriates them. The existence of this singular capacity is confirmed by a whole collection of juridical principles which the legal experts have often found disconcerting: these are the principles that decide what is called the 'right of accession'. The idea may be expressed in this way: any thing to which another of less importance is added (*accedit*) communicates to it its own status in law. An ownership that comprises the first is extended *ipso*

facto to the second and comprises it in turn. This one in turn becomes the thing owned of the same proprietor as the other. Thus, the fruits, the yield of the thing belong to its owner, even though they are separate from it. By virtue of this principle, the young of animals belong to the owner of the mother; the same rule applies to slaves. This is because there is immediate contact between mother and young and not between them and the father. In the same way, all that the slave earns belongs to the estate to which he is bound, to the master who owns this estate. The son of the family was, as we have heard, owned by the head of the family. The rights of the head of the family are extended by contagion from the son to all that the son earns. I may build a house with my own materials on the estate of another, and the house becomes the property of the owner of the estate. He may be bound to give me compensation, but the right of ownership accrues to him. It is he who enjoys the tenure of the house, and if he should die, his heirs would inherit. The deposits of alluvium along my estate are added to this property and my right of ownership is extended to the things thus added. The proof that this is a matter of contagion by contact is, that where there is separation, when a boundary is made to a field and it is thus detached in law and psychologically from its surroundings, the right of accession does not arise. In the same way, when the trees of my neighbour send out roots beneath land that I own, common possession is established and my rights of ownership are extended to these trees.

In all cases, it is the more important thing that draws the lesser to it. This means that, as the two rights of ownership are in conflict, it is of course the one with the greater force that exerts the greater power of attraction. Not only does the right spread in a general way, but it spreads, at the same time keeping the very same specific characteristics. For instance, the estate that passes by inheritance is, in many societies, inalienable. This inalienability is carried over from the estate to objects most constantly connected with the estate, that is, beasts of burden or draught animals. And the proof that this second inalienability derives from the first is, that it can be extinguished at an earlier stage and more easily. Indeed, there are many rights in which the traces of the inalienability of the

land or buildings still exist, whilst all recollection of the inalienability of the agricultural implements has been lost.

Thus, we find on every hand striking analogies between the idea of the sacred thing and that of the thing appropriated. Their characteristics are identical. Further, we have seen that, in fact, the communication of the sacred character very often brings about an appropriation. To consecrate is a way of appropriating. What indeed does 'to consecrate' mean, if not to appropriate a thing to a god or consecrated personage and to make this thing his own? Let us imagine some kind of symbol of honour and merit subject to the use of ordinary people and available to everybody: it is already plain tht there is little difference between this and a form of appropriation. But although what we have just discussed leads us to admit that such consecration may be possible, it still remains to show its reality.

To do this, we must examine the most ancient form of property known, that is to say, landed property. It is only from the time when agriculture became established that this kind of property can really be closely examined. There existed until then only a vague right of all members of the clan over the whole area held by them. A clearly defined right of property only appears at the focal point of the clan; small family groups settle on agreed pieces of land, set their landmark on them and dwell there permanently. Now it is certain that this ancient family holding was permeated by a profound sacredness and that the rights and privileges associated with it were of a sacred kind. Indeed, a proof of this is the fact that it was inalienable. For the inalienability has the distinctive characteristic of the *res sacrae* and of the *res religiosae*. And what indeed is inalienability, if not an insulation or setting apart more complete and more radical than that involved in the exclusive right of usage? An inalienable thing is one which must belong always to the same family, that is, not only at the present but in perpetuity, and which is withdrawn from common use. Not only is it impossible for individuals outside the family to enjoy this thing in the present, but they can never do so. The boundary separating them from the thing can never be crossed. We can see that, in some ways, the right to alienate or to sell is far from being the

highest point of development in the right of property: it is rather the inalienability itself that represents this point. For it is here that appropriation is most complete and best defined. It is here that the bond between the thing and the subject (or individual) who is the possessor reaches its maximum force and here too that the exclusion of the rest of the society is most strictly imposed.

But this sacred nature of landed property is revealed in its very structure. The customs we shall go on to discuss have been especially observed with the Romans and the Greeks and in India. But in any case they were certainly very widespread.

Each field or holding was surrounded by a belt separating it clearly from all the neighbouring holdings, private or public. This was a strip of land a few feet wide that had to remain uncultivated and untouched by the plough. (Fustel de Coulanges.) Now, this belt was sacred – it was a *res sancta*. This was the name given to things which, without being, strictly speaking, *divini juris*, in the sphere of the gods, were so, however, to a certain extent, *quodam modo*, as Justinian says. To violate this sacred surrounding belt, to till it and profane it amounted to sacrilege. The man who committed such a crime was accursed, that is, declared *sacer*, both himself and his oxen, and therefore anyone might kill him with impunity. 'He was condemned to have no issue and his race to death; for the extinction of a family, in the eyes of the ancients, was the supreme vengeance of the gods.'

We know, moreover, the ritual ceremony by which the sacred character of this space was maintained in a regular way. 'On certain appointed days of the month and year, the head of the family made a tour of his field following this line; he drove the victims before him, singing hymns and offering sacrifices.' (Fustel de Coulanges.) It was the path followed by the victims and sprinkled with their blood which constituted the inviolable boundary of the holding. The sacrifices took place on great stones or trunks of trees set up at intervals and called terminals. Let us hear how Siculus Flaccus described the ceremony. 'This', he says, 'was the practice of our ancestors: they began by digging out a little ditch and setting up the terminal stone on the edge, they crowned it with garlands of herbs and flowers. Then they offered a sacrifice; the victim

slain, its blood was made to flow into the ditch, and into this they threw live coals, grain, cakes, fruits, a little wine and honey. When all these had been consumed in the ditch on embers still glowing, the stone or block of wood was driven in.' It was this sacred act that was repeated every year. The terminal or boundary stone thus assumed a character that was decidedly sacred. With time, this sacred character became personified, and hypostasized in the form of a definite deity: this was the god Terminus, whose various terminals, placed about the field, were considered, in a sense, as so many altars. Thus, once the terminal was set up, no power on earth could displace it. 'It had to remain in the same place for all eternity. In Rome, this sacred principle was expressed in a myth: Jupiter, desiring to have a site for a temple on the Capitoline Hill, had not been able to dispossess the terminal god. This ancient tradition shows to what degree property was sacred, for the immovable terminal means no more than inviolable property.' These ideas and practices were moreover not peculiar to the Romans. To the Greeks, too, the boundaries were divine and became *Θέοι ὅροι*. We find the same ceremonies for making boundaries in India. (*Manou*, VIII, 245).

It was the same with gates and walls. '*Muros sanctos dicimus quia poena capitis constitua sit in eos qui aliquod in muros deliquerunt.*' It is believed that the phrase related only to the gates and walls of cities. But this limitation is arbitrary. The boundary wall of all houses is sacred: *ἕρκος ἱερὸν*, said the Greeks. In many countries, it was on the threshold that this sanctity reached its greatest force. Hence the custom of lifting the betrothed over the threshold before bringing her in, or of making an expiatory sacrifice on it. This, because the betrothed is not of the house. She is committing a kind of sacrilege in treading on sacred soil, which, if not prevented, has to be expiated. Further, it is usual for the building of a house to be accompanied by a sacrifice similar to the one for the marking of the field boundary. The purpose of this sacrifice was to sanctify either the walls or threshold or both at once. Sacrificial victims were immured within the walls or in the foundations; or they were buried beneath the threshold. Hence, its sacred character. It was a ritual similar to the one

for marking the boundaries of a city. These solemn ceremonies were well known: the myth of Romulus and Remus carries on the memory. They served for private houses as well as for public domains.

So there is a sacred basis for property being property. It consists, in fact (following on what we have said), in a kind of insulation of the thing, which withdraws it from the common area. This insulation has sacred origins. It is the ritual procedure that creates – on the confines of the field or around the house – an enclosure that in each case makes them sacred, that is, inviolable, except for those who conduct these ceremonies, which means the owners and all that belongs to them in the way of slaves and animals. What amounts to a magic circle is drawn about the field, which shields it from trespass or encroachment, because such intrusions, in these circumstances, become sacrilege. But although it is clear that these practices led to the appropriation of the thing thus insulated, we may still not see how the practices themselves originated. What are the ideas that brought men to carry out these rites and so to yield to the gods the fringes of their domains and to make them sacred ground? It is true there might be a very simple answer: that these customs were only expedients resorted to by individuals to enforce respect for their possessions. The owners might have made use of religious beliefs to keep intruders at a distance. But a religion does not descend to the level of expediency, unless the beliefs it inspires are no longer a very living thing. The customs we have described are far too primitive to have been expedients intended to safeguard worldly interests. Moreover, they were as much a source of constraint as an advantage to the owners, for they fettered their freedom of action. For these customs did not allow them to alter the boundaries of the holding or to sell it if they wished to. Once consecrated, even the master himself could do nothing to change the enclosure in any way. It was, then, an obligation he was under, rather than an expedient invented by himself in his own interest. If he adopted the procedure we describe, it is not because it was useful to him but because he had to act in this way. (Terrible nature of some of these sacrifices, that of a child). But what are the causes that lie behind this obligation?

Fustel de Coulanges thought they lay in the cult of the dead. Every family, he said, has its own dead; these dead are buried in the field. They are sacred beings, for death makes almost gods of them – and this nature is therefore extended to the ground in which they lie. This ground becomes theirs by thev very fact that they lie in it, and it is thereby sacred. We can understand that this sacredness spreads from the little mound serving as a family sepulchre to the whole field. The inalienability of property established in this way is thus explained. For the true owners of this domain are divine beings and their right is indefeasible. The living are not free to dispose of the field because the right does not lie with them.

There is no doubt that these burial places were especially sacred. They could not be sold. And although Roman law allowed a family to sell its field or holding (such a sale was difficult and met with all kinds of obstacles) it had always to remain owner of the tombs. Does this mean that the right of property is only an extension of this sanctity of the tomb? The theory is open to a number of objections:

1 If, at a pinch, it may explain the holding of the field as property, it does not account for the holding of the house as property. For the dead were not given burial in both of these places. It is true that Coulanges does not avoid this paradox. When he explains the sanctity of the hearth, he imagines that formerly the ancestors were buried beneath the hearth-stone, and when he explains why the field is sacred, he infers the presence of the dead at the heart of the field. They could, however, not be in both these places.
2 The facts on which his assumption rests that the dead were buried in the field, are few and unconvincing. There is no proof surviving in Latin and the few texts cited are very inconclusive. In any case, this custom was not nearly so widely accepted as the sacredness of landed property, inviolable and inalienable.
3 What is more decisive, the very siting of the sacred area in the field is against this explanation. If the focal point of this sanctity were the burial place, it is there that it would attain its greatest force and, inevitably, it would diminish

towards the confines. But it was on the periphery, on the contrary, that it was most intense. This is where the belt or strip of land was, reserved to the terminal god. So that it was not the family tomb the strip protected, but the whole field. If the only aim was to insulate the ancestral tombs, it is around these tombs and not at the outer fringes of the domain that this line of insulation would have been drawn.

This error of Fustel de Coulanges springs from too narrow a concept of the family cult. He reduces it to the cult of the dead, when in reality it is far more complex. Family religion was not ancestor worship alone; it was the cult of all things that played a part in the life of the family, such as the harvesting, the seasonal fruitfulness of the fields, and so on. If we take this overall view, the practices we have described become intelligible. We have to remember that, from a certain point in evolution, the whole of nature takes on a sacred character – *πάντα πλήρη Θεῶν*, gods crowd in everywhere. The life of the universe and of all things in it is related to an endless stream of divine principles. The fields, until then uncultivated, become inhabited, possessed by sacred beings conceived in some form, personified or not, who have command over them. Like all else in the world, the field has a sacred character. This quality makes it unapproachable. It matters little whether these sacred beings are devils malign by nature, or deities on the whole benevolent. The husbandman cannot enter his field without trespassing on their domain; he cannot till or shift the soil without disturbing them in their possession. Thus, he is exposing himself to their anger, which is always redoubtable, if he does not take the right precautions.

All this being granted, the rites we have described seem remarkably similar to others, well-known, that throw light on them: these are the sacrifices of the first-fruits. Just as the soil is a divine thing, the harvest which is the fruit of this soil contains, too, a principle that is divine. In the seed sown in the earth there is a sacred force that develops in the shoots of the corn and reaches its fulfilment in the grain. Thus the grains of corn are also sacred, since they have a god within them and are this god made manifest. In consequence, mortals may not

touch them until certain ritual ceremonies have tempered the sacredness that resides in them, and in such a way that they can be made use of without peril. It is this purpose that is served by the sacrifice of the first-fruits. The supreme and most formidable element in this sacredness is concentrated in a sheaf or a number of sheaves, usually the first sheaves garnered, and these are sacred: no one touches them and they belong to the god of the harvest; they are offered to him and no mortal dare partake of them. The remainder of the harvest, although still keeping a certain sacred quality, is rid of something that made an approach to it too perilous. This remainder can serve for everyday use without the user being exposed to divine vengeance, for the god has had his due, and this came to him solely because the element in the harvest that was too sacred had been got rid of. The sacred element residing in the crops has been prevented from passing over into the profane, for it has been separated from the profane, and by the sacrifice, it has been kept within the divine sphere. The line of demarcation of the two worlds has been respected, and this is the supreme sacred obligation. What we have said on the harvest applies equally to all fruits of the earth. Hence the rule prohibiting men from touching these fruits, whatever they be, without having set aside the first-fruits beforehand and offered them to the gods. There is no religion that is not familiar with this practice.

The analogies with the ritual ceremonies of the boundary stones are striking. The field is sacred, it belongs to the gods, therefore it may not be used. To enable it to serve profane ends, recourse is had to the same procedure as used in the harvest or the vintage. It has to be relieved of the excess of sacredness in order to make it profane or at least profanable, without incurring peril. The sacredness, however, is indestructible: it can therefore only be shifted from one point to another. This dreaded force dispersed about the field will be drawn off, but it has to be transferred elsewhere, so it is accumulated at the periphery. This is the purpose of the sacrifices described. It is upon an animal that the diffused sacred forces are now concentrated: then this creature is led all around the field. Wherever it passes, it communicates to the soil it treads on the sacred character that is in it and which it

has drawn off from the field. This ground becomes sacred. In order to fix this awe-inspiring sacredness upon it the better, the animal is sacrificed and in the very ground furrowed for the purpose the blood of the victim is made to flow, for the vital fluid is the supreme vehicle of all sacred principles. The blood is life itself, the living thing. Henceforward, the strip that was the scene of this ceremony is consecrated land: what was divine in the field is not transferred to the strip. Moreover, it is set aside and may not be touched; it is not to be tilled and cannot be changed in any way. It does not belong to men but to the god of the field. From now onwards all within the domain is at the disposal of men to make use of for their own needs. By the very fact, however, that the sacredness has been, as it were, pushed back to the boundary of the land, this land is *ipso facto* fenced in, surrounded by a circle of sanctity protecting it against any intrusions or occupancy from without.

Furthermore, the sacrifices made in these circumstances are quite likely to have had more than one purpose. Since the husbandman, in spite of all, had interfered with the possession of the gods, and committed an offence that placed him in peril, it was necessary to atone for it. The sacrifice brought about this atonement at one stroke. The victim took upon itself the offence committed and expiated it on behalf of the guilty. And then (as a further result), owing to the ritual carried out, not only were the deities disarmed but transformed into protective powers. They kept guard over the field, defended it and ensured that it should prosper. We could interpret the practices that were current when a house was built in the same way. To get this house built has meant disturbing the guardian spirits of the soil. They have been roused and antagonized. Thus, any and every house is forbidden to us and taboo. Before entering, there must first be a sacrifice. The victims are killed on the threshold or on the foundation stones. By this means the guilt of sacrilege was atoned for. At the same time the vengeance which was threatened is changed to favour and the angry dæmons are turned into protective spirits.

But only those who had carried out the ritual could make use of the field or house. They alone have atoned for the

sacrilege committed; they alone have conciliated the divine elements with whom they are in communication. The deities had an absolute right over the things: those who conciliated them have in part taken their place in so far as this right over things is concerned. It is those alone who effected this process of substitution who can benefit by it. They alone, therefore, can exercise the right won, as it were, from the gods. The power to use and make use of belongs to them exclusively, in their own right. Before the ritual was carried out, everyone had to keep at a distance from the things entirely withdrawn from profane use; afterwards, everyone was bound to the same stricture, these others alone excepted. The sacred virtue that until then protected the divine domain from any occupancy or trespass, was henceforth exercised for their benefit: it is that virtue which constitutes the right of property. It is because they have enlisted its service in this way that the land has become theirs. A moral bond has been forged between themselves and the gods of the field by the sacrifice, and since the link already existed between the gods and the field, the land has therefore become attached to men by a sacred bond.

This, then, seems to show how the right of property had its origin. Man's right of property is only a substitute for the right of property of the gods. It is because the things are by nature sacred that is, appropriated by the gods, that it has been possible for them to be appropriated by the profane. Also, the quality that makes property an object of respect and inviolable – a quality which in effect makes it property – is not communicated by men to the domain; it is not an attribute which has been inherent in men and from them has devolved on things. It is in things that the quality originally resided, and it is from things that it has risen towards men. The things were inviolate in themselves by virtue of sacred concepts, and it is this derived inviolability that has passed into the hands of men, after a long process of being diminished, tempered and canalized. Respect for property is, then, not – as we often hear – an extension to things of the respect that human personality imposes, individually or collectively. It has a very different source, exterior to the human person. If we want to know whence it comes, we have to see how things and men acquired a sacred character.

III

Property is property only if it is respected, that is to say, held sacred. We might think *a priori* that this sacred character derived from man – that it is the husbandman who has communicated to the soil he tills and works, something of the respect of which he himself is the object, of the sanctity which is in him. In this case the property would have no moral value except that lent to it by human personality: this would be the value which, by entering into a relation with things and by making them its own, would confer a certain dignity on them by extension, as it were. But the facts seem to prove that the notion of property came about in quite a different way. The kind of sacredness that kept at a distance from the thing appropriated all individuals except the owner, does not derive from the owner; it resided initially in the thing itself. The things were sacred in themselves; they were inhabited by potencies, rather obscurely represented, and these were supposed to be their true owners, making the things untouchable to the profane. The profane were therefore not able to intrude on the divine sphere, unless they gave the gods their due and expiated their sacrilege by sacrifices. With these preliminary safeguards, they were able to take over the right of the gods themselves and put themselves in their place. Although, thanks to this expedient, the sacred character of the field ceased to be a hindrance to the work of the husbandman, it had not become extinct. It had merely been shifted from the centre to the periphery, and there its natural potency worked against all those who had not acquired a kind of immunity to it. The gods had not been driven from the field but transferred to the confines: a kind of bond had been made between them and the owner; they had become his protectors and by these regular ceremonies he ensured that their favour should continue. But for all those outside, they were still powers to be dreaded. Woe to the neighbour whose plough had so much as grazed a terminal god! They had disarmed only towards those who had paid the debt due and had behaved to them in a proper manner. The field was in this way shielded from any incursion or from any seizure by another. A right of property

became established for the benefit of particular men. This right has, then, a sacred origin: human property is but sacred or divine property put into the hands of men by means of a number of ritual ceremonies.

We might perhaps be astonished to find an institution so fundamental and widespread as property thus resting on illusory beliefs and ancient notions which are held to have no objective foundation. Guardian spirits of the soil or the fields do not exist, we may say; how then has a social institution been able to persist, if it rests on fallacies alone? It should have crumbled away, it might seem, as soon as it came to be realized that these mystic concepts were utterly empty. But it happens that religions, even the most uncouth, are not, as is sometimes believed, merely fantasies that have no basis in reality. Certainly they do not express the things of the physical world as they are; they have little value in throwing light on the world. But they do interpret in a symbolic form, social needs and collective interests. They represent the various connections maintained by society with the individuals who go to make it up, as well as the things forming part of its substance. And these connections and interests are real. It is through a religion that we are able to trace the structure of a society, the stage of unity it has reached and the degree of cohesion of its parts, besides the expanse of the area it inhabits, the nature of the cosmic forces that play a vital role in it, and so on. . . . Religions are the primitive way in which societies become conscious of themselves and their history. They are in the social order what sensation is in the individual. We might ask why it is these religions distort all things as they do in their processes of imagery. But is it not true that sensation, equally, distorts the things it conveys to the individual? Sound, colour and temperature have no more positive existence in our world than the gods, the dæmons or spirits. By the fact alone that the representation presupposes a subject represented – (here individually and there collectively) – the nature of this subject is a factor in the representation and alters the shape of the thing represented. The individual, in picturing by means of sensation the relations he has with the world about him, puts into these images something that is not there, some qualities that come from his own mind. The

society does the same thing in picturing by means of religion the milieu that constitutes it. The distortion, however, is not the same in both instances, because the subjects differ. It is for the thinkers to rectify these illusions that are necessary in practice. We may at any rate rest assured that the religious beliefs we find at the base of the right of property conceal social realities which they express in metaphor.

To make our interpretation really convincing, we have to get through to the realities and to discover beneath the letter of the myths the spirit it expresses. That is, we have to perceive the social causes that gave rise to these beliefs. The question comes back to this: how is it that the collective imagination has been led to consider the soil as sacred and inhabited by divine principles? The problem is far too wide in scope to be treated here, all the more so since the solution still escapes us. There is, however, a way of forming some image of things that will serve our purposes – one that will allow us to see how the illusions that come from a region of myths can have in reality a positive significance.

The gods are no other than collective forces personified and hypostasized in material form. Ultimately, it is the society that is worshipped by the believers; the superiority of the gods over men is that of the group over its members. The early gods were the substantive objects which served as symbols to the collectivity and for this reason became the representations of it: as a result of this representation they shared in the sentiments of respect inspired by the society in the individuals composing it. This is how deification came about. But although the society is superior to its members taken singly, it exists only in them and through them. The collective imagination therefore had to be brought to the point of conceiving of sacred beings as indwelling in men themselves. This is indeed what happened. Every member of the clan is supposed to carry within himself a share of the totem whose cult is the religion of the clan. In the Wolf Clan, each individual is a wolf. There is a god within him and indeed several. If, then, there are gods in things and especially in the soil, it is because things, and especially the soil, are associated with the intimate life of the group just as much as human beings are. This is because they are believed to live the life of the community.

Therefore it is quite natural that the principle of communal life should reside in them and make them sacred. We now get an idea of what this sacred character is, that the soil is imbued with. It is not a mere invention without foundation, some figment of a dream. It is a stamp the society has put on things, because they are closely mingled with its life and form part of itself. If the soil was not to be approached by the foot of individuals it is because it belonged to the society. This is the true potency that set it apart and withdrew it from any private appropriation. To sum up, we might say: that private appropriation presupposes an initial collective appropriation. We have said that the believers took upon themselves the right of the gods; we should now say that the individuals took upon themselves the right of the collectivity. It is from this collectivity that all sacredness issued. It alone (if we confine ourselves to things empirically known) has adequate power to raise the existent thing – whether it be land, animal or person – above and beyond the reach of any private assault. Private property came into existence because the individual turned to his own benefit and use the respect inspired by the society, that is, the higher dignity with which it is clothed and which it had communicated to the things composing its material substitute. As to the hypothesis, according to which the group was the original possessor of things, that fits in perfectly with the facts. Indeed, we know that it is the clan that owned the land in common, land that it was settled on and which served for hunting or fishing.

Looked at from this point of view, even the ritual practices we have described take on a new significance and can be defined in secular terms. The sacrilege that man thinks he is committing against the gods by the very fact of tilling and breaking up the soil, is in truth committed against society, since society is the reality hidden behind these mythical concepts. It is therefore, in a way, to society that man makes his sacrifices and offers up the victim. Again, when these figments of men's minds dissolve, when these phantom deities vanish into air and the reality they represent appears by itself alone, it is to this society that these annual tributes will be offered, by which the believer originally bought the right from his deities to till and cultivate the land. These sacrifices, these

first-fruits of all kinds, are the earliest form of taxes. First, they are debts that are paid to the gods; they then become tithes paid to the priests, and this tithe is already a regular tax that later on is to pass into the hands of the lay authorities. These rites of atonement and propitiation finally become what amounts to a tax, although unsuspected. The germ of the institution is there, however, and is destined to develop in the future.

If this interpretation is right, the sacred nature of appropriation had for a long time simply meant that private property was a concession by the collectivity. But however this may be, the circumstances in which property came into being did determine its nature. It could only be collective. in fact, it was by groups that the land was appropriated in this way, that the formal ceremonies described were carried out and thenceforth the whole group had the benefit of the results. These formalities even had the effect of giving the land a personal identity and cohesion that it did not originally possess. This strip of consecrated land separating the field or holding from those adjoining, at the same time insulates all those within it from similar groups settled elsewhere. This is why the coming of agriculture undoubtedly gave to family groups smaller than the clan a cohesion and stability they had not known before. It was truly the individual nature of the field that made the collective individuality of these family groups. Henceforward, these groups no longer yielded to the slightest change in their circumstances: no longer did they take shape for a time and then disperse, according to the impulse of private sympathies or fugitive interests. They possessed a definite form, a bone structure, as it were, which made its indelible pattern on the very land they lived on: for it was indeed they who made the form and contour itself of that land – a form that was unchanging.

This goes to explain one of the features of collective family property. It means that under this system people are possessed by things at least as much as things are possessed by people. Kindred are kindred only because they make common use of a certain domain. If anyone makes a final parting with this economic community, all links of kinship with those that remain are cut. This predominating influence of things

becomes very clear from the fact that in some circumstances people may leave the group thus formed and cease to be kindred. The things, on the contrary, the landed property and all that goes with it, remain there in perpetuity, since the patrimony is inalienable. In some cases, this possession of people by things goes so far that it ends up by becoming a real form of slavery. This is what happened to the 'epicleros' daughter in Athens. If the father had as offspring a daughter only, she would inherit, but it was the status in law of the property which came to her that fixed her own status in law. Since the estate could not go out of the family, precisely because it was the very heart of it, the heiress was bound to marry her nearest male relative; if she was already married, she had either to break her marriage or renounce her heritage. The person followed the thing: it was a question of the daughter being inherited rather than inheriting. All these facts are easily explained if landed property has indeed the origin we have assigned to it. For then it is the property in the form of real estate that binds the land to the family; it is that property that has made the family's centre of gravity and that has even imparted to the family its own external forms. The family means the individuals taken as a whole who lived in this insulated and sacred little island that made up the domain. It is the laws that bind them to the sacred soil they cultivated which therefore unite them amongst themselves. This then, generally speaking, is how the kind of cult whose object is the family field or holding came into being, and the sacred prestige and awe this cult inspired in men's minds. The cult did not acquire this prestige merely through the vital importance of the soil to the husbandman, nor from the supreme power of tradition, but simply because the soil itself was steeped in sacred meaning. It was far more a case of the sacredness of the holy thing being communicated to the family, than of its deriving from the family.

But precisely because property, in its origins, can only be collective, it remains to explain how it became something individual. How is it that individuals thus grouped together, attached to an indentical group of things, came to acquire separate rights over separate things? The land holding cannot, in principle, be broken up: it forms a single unit, and that is

the unit of the inheritance; and the indivisible unit is imposed upon the group of individuals. How does it happen that, in spite of this, any individual should have been able to reach this point of having property of his own? As we might guess, this individuation of property could not come about without involving other changes in the situation as between things and persons. For as long as the things preserved this moral superiority over persons, as it were, it was impossible for the individual to become their owner and establish his own command over them.

There were two different causes underlying this result. To begin with, it was enough for one of the members of the family group to be raised in rank in some way – by a chain of circumstances – for him to be lent a prestige that none of the others had and to make him the representative of the family group. In consequence, the ties binding the things to the group bound them direct to this privileged personality. And since this individual embodied in himself the whole group, men and things, he was in fact invested with an authority that placed things as well as men under his dominance, and thus an individual property came into existence. This change was achieved with the coming of paternal, and more especially, patriarchal, power. We heard last year what the causes were that led the family to emerge from a state of close unity and equal rights – still seen until recently in Slav families – and to elect a head to which it submitted itself. We saw how, by that very fact, this head of family became a high moral and sacred power: this is because the whole life of the group was absorbed in this head, and thus he came to have the same transcendence over each of its members as the collectivity itself. He was the family entity personified. And it is not alone people, traditions and sentiments that happen to find expression in his person. It is, too, above all the patrimony, with all the concepts attaching to it. The Roman family was made up of two kinds of elements: the head of the family, on the one hand, and on the other the rest of the family, called the *familia*, which comprised at once the sons of the family and offspring, the slaves and all things or property. All that was of moral or religious significance in the *familia* was, as it were, concentrated in the person of the head of the family. This is what

gave him such a supreme position. The family's centre of gravity thus became displaced. It passed from the things it was vested in to a given person. Henceforward an individual came to be an owner, in the full sense of the word, since the things were subject to him, rather than he to them. It is true that so long as the authority of the head of the family was as absolute as it was in Rome, he alone could exercise this right of property. But when he had passed away, each of his sons, successively, was called upon to exercise it in turn. And by degrees, as the patriarchal power became less despotic, at least as a right, and as the individuality of the sons came to be acknowledged even before the death of the father, they were able – to some extent, at any rate – to become owners in his lifetime.

The second cause of the individual becoming an owner was no less effective in the result. Its action ran parallel to the effects of the first that I have just described and it reinforced them.

This second cause was the development in the sphere of personal or movable property. Indeed it was only landed property that had the sacred character. This had the effect of withdrawing it from being within the disposal of individuals and so made a communal system necessary. Personal or moveable property, on the other hand, was in itself, as a rule of a profane-nature. However, so long as industry remained solely agricultural, personal property played only a secondary and auxiliary part; moveables were hardly more than adjuncts or annexes of landed property. This was the centre to which all that was moveable in the family gravitated, things as well as people. It kept all *things* within its sphere of action and thereby prevented them from acquiring any legal status in keeping with their particular features, and from developing the germ within them of some new right. Also, any earnings that members of the family could make outside the family community flowed into this family patrimony and was merged with the rest of the property, on the theory that the accessory follows the principal. But as we said, the implements and the dead or live stock that were used more especially in farming and were therefore in closer contact with the soil, shared with it its characteristic attribute; that is, they were inalienable.

With time, however, and with the progress of trade and industry, the personal or moveable property took on greater importance; it then cut away from this landed property of which it was only an adjunct; it played a social role of its own, different from landed property, and became an autonomous factor in economic life. Thus a fresh nucleus of property was made outside real estate, and so did not, of course, have its characteristic features. The things comprised in such a nucleus had in themselves nothing that put them beyond the reach of any trespass such as we discussed. They were only things, and the individual into whose hands they came was likely to find himself on an equal footing or even above them. He could therefore dispose of them more freely. Nothing tied them to any given point in space; nothing made them immoveable. This meant that they depended direct only on the person of the one who acquired, or on some way in which he had acquired them. And that is how this new right of property came about. But it is clear, in the light of our present-day laws, that real estate and moveable property are quite different in nature, and this reflects the separate phases of evolution in the law. The former is still loaded with prohibitions and obstacles which are mementos of its ancient sacred character. The latter has always been freer, more flexible, more entirely left to the discretion of individuals. Real as this duality may be, we must not lose sight of the fact that the one type of property issued from the other. Personal property, as a distinct entity in law, was formed only as a result of landed property and on its pattern: it is a weak reflection, an attenuated form of it.

It was landed property as an institution which first established a bond *sui generis* between groups of persons and certain given things. Once that had been done, public opinion was quite naturally ready to admit that, as social conditions changed, bonds similar in the main might link things with personalities in place of collectivities. This was only applying a previous system of regulations to new circumstances. Personal or moveable property is in a way no other than immoveable property modified to accommodate the feature peculiar to moveable property. It bears the stamp of its origins even today. It may in fact be inherited and by the same title as the

other; in the case of descent in direct line, the right of succession has to be observed. Inheritance is undoubtedly a survival of the phase of early communal property. It seems to be a fact that this communal property, which in the beginning was identified with real property or immoveables, was in reality the prototype of personal or moveable property.

It is now clear how property as we know it today is linked with the mystic beliefs we have found at the root of the institution. Originally, property was related to land, or at least the distinguishing features of landed property extended even to moveables, owing to their lesser importance; these features, by virtue of their sacred nature, imply of necessity communalism. Here, then, we have the starting point. Then, by a dual process, individual ownership splits off from collective ownership. The concentration of the family, on the other hand, which established patrimonial powers, causes all these sacred virtues (that were inherent in the patrimony and gave it an exceptional status), to issue from the person of the head of the family. From now onwards, it is man who stands above *things*, and it is a certain individual in particular who occupies this position, that is, who owns or possesses. Whole categories of profane things take shape independently of the family estate, free themselves of it and thus become the subject of the new right of property, one that is in its essence individual. Then again, the individualizing of property followed from landed property losing its sacrosanct quality – a quality which was absorbed by the human being. It was due also to the fact that the other form of property, which in itself did not have this quality, evolved to the point of having a distinct and different juridical structure. But since communal property is the stock from which the other forms sprang, we find traces of it in their structure as a whole.

It may appear surprising to see no part assigned in the origins of the right of property to the concept of its deriving from labour. But if we look at the way in which the right of property is regulated by our code of law, we shall not find this principle expressly laid down in any part of it. Articles 711 and 712 of the Code of Civil Law say that property is acquired by inheritance or succession, by gift or donation, through accession, by uninterrupted possession, or by the effect of

binding obligations. Of these five methods of acquisition, the first four do not imply the concept of labour in any way,[4] and the fifth not necessarily so. If a sale transfers the ownership of a thing to myself, it is not because this thing has been produced by the labour of the individual making it over to me, nor because what I give in exchange is the result of my labour; it is simply because both the one and the other are in the lawful possession of those who exchange them and this possession is founded on a valid right. In Roman law, there is even less evidence of the principle. We might say that in law, the vital element in all methods of acquiring property is: the material taking possession, the holding of it and the close contact with it. Not that this physical fact is enough to constitute ownership; but it is always necessary, at least initially. Furthermore, what demonstrates *a priori* that this concept has not affected or, at least, deeply affected the right of property is that it is of quite recent origin. It is not until we get to Locke that we see the theory that property is legitimate only if it is founded on labour. Grotius seemed still unaware of it at the beginning of the century.

Is this to say that the theory does not appear in our laws? Not at all; but it did not derive from any provisions relating to the right of property. It is to the right of contract that we have to look. Moreover, it seems right to us that all work that is or can be put to use by others should have remuneration and that this should be in ratio to the useful labour expended. All remuneration confers rights of ownership, since it transfers things to the beneficiary. By this means a change or transformation in the right of contract has come about, which must of necessity affect the right of property. It may even occur to us that the principle which was in process of evolving is in conflict with the principle on which any personal appropriation has hitherto rested. For we cannot have just work by itself: it calls for some material substance, some object it has to be applied to, and this object must have already been appropriated, since the work is done to modify it. The work therefore does away with the appropriations that are not founded on work. Hence these conflicts between the new demands of conscience which are beginning to set in, and the earlier concept of the structure of the right of property. But

since these new demands have their origin in the new concepts that we begin to see in contractual law, it is proper to examine them in the principles of contract.

NOTES

1 In France: legally constituted, under a *juge de paix*.
2 Meaning assumed by editor of *Professional Ethics and Civic Morals*.
3 *Ibid*.
4 Accession may include the application of labour, according to A. W. Dalrymple (Legal Terms). [Trs.]

CHAPTER 8

The Nature and Evolution of Contract

I

For most, the notion of the contract is of an operation so simple that it could be deemed to be the primary fact from which all other social facts have derived. It is upon this idea that the theory of the social contract rests. The outstanding example of the social bond which unites individuals within one and the same community must have been or ought to be one of contract. And if we thus take the contract as a phenomenon of early origin, considered either in time or, as by Rousseau, logically, this is because the concept of it seems clear in itself. It appears to have no need of being linked with some other concept that explains it. Jurists have often proceeded according to the same principle. In this way they have traced the origins of all obligations arising from man as a social fact, either to breaches of the law or to the contract. All other obligations that have not their source precisely in such breaches or in a contract, in the true meaning of the term, are held to be variations of these two. In this way the theory of the quasi-contract has been formed by which, for example, we explain the obligations arising out of the management of other people's affairs, or out of the fact that a creditor has received more than his due. The idea of the contract seemed so revealing in itself that the originating cause of these various obligations also seemed in itself to lose all obscurity as soon as it had been assimilated with the contract proper, that is, as soon as it had been set up as a kind of contract. Nothing, however, could be more deceptive than this seeming clearness.

Source: Durkheim, E. *Professional Ethics and Civic Morals* (Routledge & Kegan Paul, 1957). Translated by C. Brookfield.

Far from the contract being of early origin as an institution, it does not appear, and above all, does not develop, until a very late date. Far from being simple, it is of extreme complexity and it is not easy to see how it took shape. It is important to understand this first of all. To be clear on this point, let us make a start by defining how the bond of contract itself is composed.

To begin with, what does a juridical moral bond consist in? This term may be applied to a relation conceived by the public consciousness as existing between two subjects, individual or collective, or between these subjects and a thing, and by virtue of which, one of the parties in question has at least a certain right over the other. As a rule, a right exists on both sides. But these mutual rights are not inevitable. The slave is bound in law to his master and yet has no right over him. Now, bonds of this kind may come from two different sources. (1) Either they derive from a state or condition in being, of things or of persons in relation; and it – the state or condition – may be such that these things or persons are (intermittently or permanently), of a certain nature, in some particular setting, and held by public consciousness to possess certain acquired characteristics. Or, (2) they derive from a state not yet in being of things or of persons, but simply desired or willed on both sides. In this case, then, it is not the intrinsic nature of the state or condition that brings about the right, but rather the fact that the state is willed or desired. The right consists in this instance simply in bringing about the state just as it has been willed. Thus, because I was born in a certain family and bear a certain name, I have duties towards certain persons who are related to me, or towards certain others over whom I may have to exercise some guardianship. Because a certain thing has effectually come into my patrimony by legitimate means, I possess rights of ownership over this thing. Because I own certain landed property having certain features of situation, I have a certain right of easement over the neighbouring estate, and so on. . . . In all these instances it is a fact, established or made a reality, that brings about the right I exercise. But I may come to an agreement with the owner of a house for him to lease his property to me, in return for a sum of money to be paid over to him every year on certain agreed terms. In this

event there is simply the will on my part to occupy this property and to pay the sum promised, and on the part of the other the will to surrender his rights in consideration of the sum agreed upon. Here, however, there are only volitions, or states of will in question, and yet this state of wills may be enough to bring about obligations and therefore rights. It is for the bonds that have this origin that the term 'contractual' has to be reserved. Clearly, between the extremes of these two contrasting types, there are countless intermediary links. The main thing is to take a close look at these extremes so that we may the better appreciate the contrast. The complete divergence is indeed striking. On the one hand we have relations in due form according to law, having as their origin the status of persons or of things, or of the modifications so far latent in this status; on the other, relations according to law having as their origin wills that are in agreement to modify this status.

This definition shows at once that the bond of contract could not have had a very early origin. Indeed, men's wills can not agree to contract obligations if these obligations do not arise from a status in law already acquired, whether of things or of persons; it can only be a matter of modifying the status and of superimposing new relations on those already existing. The contract, then, is a source of variations which pre-supposes a primary basis in law, but one that has a different origin. The contract is the supreme instrument by which transfers of ownership are carried through. The contract itself cannot constitute the primary foundations on which the right of contract rests. It implies that two legal entities at least are already properly constituted and of due capacity, that they enter into relations and that these relations change their constitution; that some thing belonging to the one passes to the other and vice versa.

There may be, for instance, two families, A and B; a woman leaves A to go off with a man of B and becomes in some respects an integral part of this group. A change has been brought about in the scale of the families. If this change occurs peacefully, with the consent of the two families concerned, we then get, in more or less rudimentary form, the marriage contract. Hence it follows that marriage, being of necessity a contract, pre-supposes an existing structure of the family that

has nothing contractual about it. This is one proof the more that marriage rests on the family and not the family on marriage. If we can suppose that incest had not been always something prohibited, and that every man had been united to a woman of his own family, sexual union would not have involved any actual transfers either of persons or of things. The marriage contract would not have come into being.

We are agreed that the bond of contract is not of very early date. At the same time it is easy to see how it came to be devised only at a late stage. What indeed is the origin of bonds, that is to say, of rights and obligations that have their source in the state or condition of persons or of things? They derive in fact from the sacred character of one or the other, from the moral prestige they are endowed with, either direct or indirect. When early man considers himself under binding obligation to his own group, it is because this group is in his eyes the supremely holy thing. If he acknowledges his obligations equally towards the individuals forming the group, it is because something of the sanctity of the whole is communicated to its parts. All members of the same clan have within them, as it were, a particle of the divine being from which the clan is supposed to be descended. Thus, they bear the mark of a sacred symbol, and this is why they are bound to be defended, to have their death avenged, and so on . . . . We have seen too that the rights which have their origin in things, derive from the sacred nature of things; we need not revert to this. Therefore, all moral and juridical relations and ties which derive from a personal or from a *real* status, owe their existence to some virtue *sui generis*, inherent either in the subjects or the objects and compelling respect. But how could a virtue of this kind reside in mere inclinations of the will? What is there and what could there be about the action of willing some thing or willing some relation, which may compel this relation to be carried into practical effect?

First, let us have a look at this idea that the agreement of two wills bent upon a common aim may possess a character that makes it binding on each. Here we have an important innovation in law that argues a very advanced stage in its history. When I have resolved to act in a certain way I am always free to go back on my decision. Why then, should two

decisions coming from two different individuals have a greater binding force, simply because they are at one in agreement? It is understandable that I should come to a halt in the presence of a being which I hold to be sacred, and that I should refrain from touching him or from modifying his status, whatever it be, owing to the qualities I attribute to him and to the respect he thus inspires in me. It is the same with things, which may be similarly placed. But an act of the will, a resolve, remains still only a possibility: this is, by definition, not a thing that has in any way materialized or become effective. How is it that a thing should be able to compel me to this degree, a thing which is not in being or which is in being only in the region of ideas? We may suppose that all kinds of factors must have intervened for our volitions to have become endowed with a compelling quality not found implicit in them when they are analysed. And so, the juridical notion of the contract, that is, of the contractual bond, far from being immediately self-evident, must have been built up by long endeavour.

Indeed, it was only by very slow degrees that societies succeeded in getting past the initial phase of the purely statutory right and in superimposing upon it a new right. It was only by successive changes in statutory right that they drew nearer by gradual stages to the new right. This development came about in various ways and the main ones are as follows.

New institutions begin as a rule by taking the old as their model and only split off from these by degrees in order to develop their own pattern in freedom. The function of the right of contract was to modify the status of the person; to bring this about, however, the right was conceived on the model of the statutory right. The bonds that unite persons by reason of their state, acquired and established, are dependent on this state. They come about owing to the fact of these persons having a quality in common that makes each respected by the other. To put it more precisely, members of the same clan or family have duties towards one another because they are supposed to be of the same flesh and blood. Not that this physical relationship in itself has any moral efficacy. But it means that the blood is the vehicle of a sacred principle which it mingles with: to be of the same blood is to share the same

god and to have the same sacred quality. Very often, too, the ritual of adoption consists of introducing some drops of blood into the veins of the one adopted. It follows, then, that when men felt the need to create ties other than those of their own family status, that is, ties which they willed, they conceived them as a matter of course in the likeness of the only ties familiar to them. Two different individuals or groups, between whom no natural ties exist, agree to be associated in some common aim: in order that this covenant should be binding, they must bring about the physical blood relationship considered to be the source of all obligations. They mingle their blood. For instance, the two contracting may dip their hands in a jar into which a little of their blood has been made to drip, and they suck up a few drops.

It is this process that Robertson Smith studied under the name of 'blood covenant'; its nature and world-wide range are to-day well known. In this way, the two parties became under an obligation or pledge to one another; in some respects this relation was the result of an act of their will; there was an element of contract in it; but it acquired its whole efficacy only by taking the form of a relation by contract. The two individuals formed, as it were, a kind of artificial group which rested on ties similar to those of the natural groups to which each belonged. There were other ways that led to the same result. Food makes blood and blood makes life; to eat the same food means to commune together or partake of the same source of life; it means making the same blood. It is from this that we reach the important part played by the rite of communion by breaking bread in all religions, from the most ancient to Christianity. The same sacred thing is eaten in common, thus partaking of the same god. Those taking part become pledged by this act. The two persons contracting were equally able to bind themselves by drinking from the same cup, by eating from the same dish of food or even by sharing a meal. The act of drinking from the same cup is to be found in many wedding customs. The practice of sealing a contract by drinking together probably has the same origin, and likewise that of shaking hands.

In these examples we see bonds of the personal status serving as a pattern for the bonds of contract that were

beginning to develop. But bonds of the *real* status were used for the same purpose. The rights and obligations that I have in regard to a thing are dependent on the state or condition of this thing, on its position under the law. If it forms part of the patrimony of another, I must respect it; if, nevertheless, it should come into my patrimony, I must restore it or hand over its equivalent. This being so, let us suppose there are two individuals or two groups wishing to make an exchange, for instance, to exchange one thing for another or for a sum of money. One of the parties hands over the thing; by this act along, the one who receives it finds himself contracting an obligation, that of handing over its equivalent. Such is the origin of what has been termed the *real* contract, that is, a contract formed only by the actual delivery or handing over of a thing. We know the part played by real contract not only in Roman law and Germanic law, but in our own ancient French law. Very clear traces of it still remain even in the law of the present day. For it is from this source that the custom comes of giving earnest-money or *arles*. In place of giving the object of exchange itself, only part of its value was given or some other object. Very often a thing without value came to suffice, such as a straw, or the glove used in Germanic law. The object received made the one receiving it a debtor towards the other. In the course of time, it became enough to make a gesture of presenting the object. But as we see, neither the blood covenant nor the *real* contract was, properly speaking, a contract. For in both cases, the obligation does not come about from the efficacy of the wills in agreement. These would, of themselves, have no binding force. They must over and above this cover a state or condition of persons or of things and it is in reality this state and not the contracting wills, that is the operative cause of the bond made. When, on the strength of a blood covenant, a man finds himself under obligations to his kindred by adoption and vice versa, that is not by virtue of the pledge given but because the covenant has this force of making them of the same blood. If, in a *real* contract, I am in debt for the price of the object received, it is not because I have promised it but because this object has passed into my patrimony, because it has henceforth a certain position under the law. All these practices are just so many

methods of reaching almost the same result as a contract made by means other than the contract proper. For, we must repeat, what constitutes the contract is the declared agreement of the wills concerned. And there must be something more than this: a state or condition of things or of persons without any intermediary must have been set up, of a kind to bring about effects in law. As long as an intermediary exists, there can be no true contract.

There is, however, another way of getting nearer to the contract proper. The wills can effect a bond only on condition of declaring themselves. This declaration is made by words. There is something in words that is real, natural and living and they can be endowed with a sacred force, thanks to which they compel and bind those who pronounce them. It is enough for them to be pronounced in ritual form and in ritual conditions. They take on a sacred quality by that very act. One means of giving them this sacred character is the oath, or invocation of a divine being. Through this invocation, the divine being becomes the guarantor of the promise exchanged. Thereby the promise, as soon as exchanged in this way (and even though it should not reach the point of execution), becomes compulsive, under threat of sacred penalties of known gravity. For instance, each contracting party pronounces some phrase that binds him and a formula by which he calls down upon his head certain divine curses if he should fail in his undertaking. Very often, sacrifices and magical rites of all kinds reinforce still further the coercive force of the words uttered.

This, then, seems to be the origin of contracts made in all due and solemn formality. One of their features is that they are binding only if the parties make an undertaking by a formula, solemn and agreed, which cannot be evaded. It is the formula that binds. This is the distinctive sign by which we recognize a main feature of magic and sacred formulas. The juridical formula is only a substitute for sacred formalities and rites. When certain definite words, arranged in a definite sequence, possess a moral influence which is lost if they are different or merely pronounced in a different sequence, we can be certain that they possess or have possessed a sacred significance and that they derive their peculiar powers from acred causes. For it is only the sacred phrase which has this effect upon things

and upon human beings. With the Romans especially, one fact tends to show clearly that the origin of the contract had a sacred character: this is the custom of the *sacramentum*. When two contracting parties were in disagreement on the nature of their respective rights and duties, they deposited a sum of money in a temple, which varied according to the importance of this dispute: this was the *sacramentum*. The one who lost his case also forfeited the sum he had deposited. This means he was fined to the benefit of the deity, which argues that his project was held to be an offence against the gods. These gods were, then, party to the contract.

We can now see how slow the notion of the contract was in developing. The blood covenant and the *real* contract are not true contracts. The solemn agreement or contract is closer to it. For in this case the undertaking is sacred as soon as the wills in question have been declared by words accompanied by consecrated formulas. Even in this instance, the moral value of the undertaking does not come about through the consent of the wills but by the formula used. If the solemn ritual is lacking, there is no contract.

II

We . . . [have seen] how difficult societies found it to rise to the concept of an agreement or contract. All rights and duties derive from a state that has come into being of things or of persons; but in the contract proper, it is a state simply conceived and not yet in being that lies at the root of the obligation. Nothing has been acquired or given except a declaration of will. How is it possible for such a declaration to bind the will from which it springs? Should we say that in the contract there are two wills concerned and that they bind each other mutually in some way; that they have become bound up together in some fashion and that this association does not leave them wholly free? But how can the promise made by the other contracting party to fulfil certain terms of performance – if on my part I fulfil certain other terms of performance – compel me to honour my promise and vice versa? It is not because the other has pledged himself towards me that my

undertaking towards him is binding in greater or lesser degree. The one undertaking is not of a different nature from the other; and if neither has in itself the moral authority to compel the will, it will not be got by their agreeing. Moreover, in order that there shall be a contract, there is no need for an undertaking of reciprocal performance. There may also be unilateral contracts. For instance, deeds of gift and contracts under guarantee do not involve any exchange. If, in a case of this kind, I declare that I will give a certain sum or some object to a certain given person, I am bound to carry out my promise although I have received nothing in exchange. Therefore in this case it is solely the declaration of my will, without any reciprocal declaration, that binds me. How does it come to have this particular force?

It was only by very slow degrees that the people of various nations reached the point of endowing this demonstration of will alone with such force, both moral and juridical. When exchanges or transfers of property became more frequent and a need for contractual relations began to make itself felt, expedients were arrived at to meet this need. Without founding a new right, an attempt was made to adapt the statutory right to these new demands. This was the principle adopted. As soon as the parties were in agreement, a state or condition of things or of persons was brought into being, which carried further obligations in its train. For instance, one of the contracting parties would carry out the terms of the performance he had undertaken. Henceforward, there was something acquired and established that bound the other party. The vendor delivered the thing; the thing, which in this case passed into the patrimony of the purchaser, put an obligation upon him to fulfil his part: this was by virtue of the principle – everywhere accepted but differently observed by various societies – that no one may enrich himself at the expense of another. or, it might be that once the terms of agreement were settled, the contracting parties submitted themselves to a process that created a kind of kinship *sui generis* between them; this acquired kinship then introduced between the two a whole system of rights and duties.

By these two processes, a change was introduced in the statutory right in consequence of an agreement of wills, and

the bonds made come to have a contractual character. But these bonds are not the product of the agreement of wills, and in this respect there is still no true contract. In the two cases, the consent of itself has no power to compel; at least, it produces no rights, except through an intermediary. It is a state, acquired by things or by persons, following upon the understanding but without any intermediary, that causes the understanding to have juridical effects. As long as the performance has not been carried out, at least in part, and as long as the contracting parties have not mingled their blood or have not sat at the same table, they remain free to revoke their decision. Thus, the declaration of the will by itself alone is devoid of any efficacy. The statutory right has been used to achieve almost the effects of the contractual right but this right has so far still not come into existence.

There is, however, another way in which men succeeded in getting nearer to it. Whatever the process, the wills can bind themselves only on condition of declaring themselves exteriorly, of projecting themselves outwardly. They have to become known, so that the society may attach a moral significance to them. This declaration or outward manifestation is done by the aid of words. Now, there is something in words that is real, natural and living, something that can be endowed with a sacred force things to which, once pronounced, they should have the power to bind and compel those who pronounce them. It is enough for them to be uttered according to a certain ritual form and in certain ritual conditions. Henceforward, they become sacred. We can well imagine that words, once they have assumed this sacred quality, impose respect on those who have uttered them. They carry the same prestige as those persons and things which are themselves the object of rights and duties. They too, therefore, may be a source of obligations. One means of conferring this quality on them and hence this binding force, is the oath or invocation of a divine being. By this invocation, this being becomes the guarantor of the promises made or exchanged: he is present and communicates to them something of himself and of the sentiments he inspires. To fail in this is to offend, to be exposed to his vengeance, that is, to sacred penalties which

seem to the believers as certain and inevitable as those later to be imposed by the tribunals. In these circumstances, once the words have left the lips of the contracting party, they are no longer his own, they have become something exterior to him, for they have changed in nature. They are sacred and he is profane. In consequence, they are beyond his free-will: although they come from him, they are no longer dependent on him. He can no longer change them and he is bound to carry them out. The oath, too, is a means of communicating to words, that is, to the direct manifestations of the human will, the kind of transcendence we see in all moral things. Also, it separates the words, as it were, from the person who utters them and makes something new of them, which is then imposed on the speaker.

Such, then, certainly seems to be the origin of contracts made in all due and solemn formality. One of their features is that they are not valid unless certain agreed formulas have been pronounced. This cannot be evaded: otherwise the contract has no binding force. An essential feature of magic and sacred formulas can be recognized by this sign. When certain definite words, arranged in a given sequence, are held to have a force which is lost if the slightest change is introduced, we can be sure that they have or have had a sacred meaning and that they derive their peculiar powers from a sacred source. For it is only the sacred phrase that has this effect upon men and things. Juridical formalism is only a substitute for sacred formalities and rites.

As far as the Germanic tribes were concerned, the word used to describe the act of making a solemn contract is *adhramire* or *arramire* which is translated by: *fidem jurejurendo facere*. Elsewhere we find it combined with the *sacramentum: 'Sacramenta quae ad palatium fuerunt adramita.' Adhramire* is to make a solemn promise on oath. It is extremely likely that in the beginning the Roman *stipulatio* had the same character. It is a contract made *verbis*, that is, by established formulas. Anyone knowing to what degree Roman law was in principle a sacred and pontifical thing, will have little doubt that these *verba* were at first ritual formulas intended to give a sacred character to the undertaking. It is certain they were

pronounced in the presence of priests and possibly on sacred ground. Were not solemn words, moreover, called sacramental words?

It is probable that very often, if not always, the verbal ritual did not suffice to sanctify the words exchanged and make them irrevocable; manual rites were also employed. Such was the origin most likely of the *denier à Dieu* (the Lord's pence or gratuity). This was a coin that one of those contracting gave to the other once the bargain was clinched. It was not an instalment, or earnest-money, on the price, a kind of *arles* or pledge, for it was an extra payment provided by one of the parties which was not charged to the sum finally paid. It does not therefore seem possible to read into it a fulfilment in part such as we see in *real* contracts. It must have a meaning. As a rule, it was used in religious practices and this is shown in its name: *denier à Dieu*. Might it not be a survival, rather, of some offering intended to interest the deity in the contract in some way, to make him party to the arrangement? This seems quite as effective a way of invoking him as the spoken word and thus, of giving sanction to the undertaking proposed.

The same probably applies to the ritual attached to the straw stall. . . . [we have seen] in this rite a survival of the *real* contract. We were mistaken, however. There is in fact no reason to believe that it is any less ancient than the *real* contract and hence there is no evidence to show it derives from that particular form. Another fact against associating the two is that the straw stalk or *festuca*, the delivery of which sanctified the bond contracted, was handed over, not by the future creditor, but by the future debtor. It was not, then, like the handing over in the *real* contract, a performance completed, in full or in part, since the performance on the part of the debtor still remained to be carried out in full. Such a procedure could not have the effect of binding the creditor to the debtor but rather of binding the debtor to the creditor. Finally, the solemn contract of the Romans that was made *verbis*, that is, by means of hallowed formulas, bore the name *stipulatio*. Now the word *stipulatio* comes from *stipula*, also meaning the straw stalk. And '*Veteres, quando sibi aliquid promettebant, stipulam tenentes frangebant.*' The stipula remained in popular use up to fairly recent times. This means

that it had a close connection with the solemn verbal contract. The two procedures seem inseparable. It is difficult to tell the exact meaning of this ritual. Evidently it signified a kind of liege homage or tribute by the debtor to the creditor, binding on the debtor. This made something of the legal identity of the debtor pass to the creditor, that is, some part of his rights. What makes me think that this is the true explanation is the nature of the procedure that took its place in the Middle Ages that succeeded that early period. The *festuca* indeed hardly survived the Frankish epoch. A gesture of the hand took its place. When it was a matter of an undertaking that had to be given towards some particular person, the future debtor placed his hands in those of the creditor. Where a unilateral promise alone was concerned or the affirmation of an oath (an affidavit), the hand was placed on holy relics or raised (was it to call heaven as witness?). We can appreciate the sacred, not to say the mystic character of these gestures, since they are still sometimes used, even in our own day; at any rate there is no doubt that their purpose was to create a bond. We are especially aware of this in two kinds of contract of primary importance. First, the feudal contract that bound man to his lord. To plight his troth and homage, the man knelt and put his hands in those of his lord, promising fealty. The same practice is to be found in the contract of betrothal. Those betrothed engaged to marry by joining their hands and the ritual of Catholic marriage still has the traces of this. We know too that the contract of betrothal was binding.

We are no longer able to say precisely what the religious beliefs were that lay at the root of these practices. Some general indications do, however, come out of these comparisons. The laying on or joining of hands is a substitute of the handing over of the *festuca*; both therefore have the same meaning and the same purpose. The laying on of hands at any rate is very well known. It has been used in all religions. When it is a question of blessing or consecrating any object, the priest places his hands upon it. When it is a matter of the individual shedding his sins, he places his hand on the victims he is about to sacrifice. Whatever there is base or sinful in him and in his personality leaves him and is communicated to the beast and destroyed with it. It is by a process of the same sort,

in another instance, that the victim offered up to do homage to some deity, becomes the substitute for the person who sacrifices it or has it sacrificed. Thus, the personality – either as a whole or in some particular part – appeared to men's minds to have the quality of something communicated or communicable. And clearly, the function of these rituals was to bring about communications of this kind. It is true that when we examine them against our ideas of the present day, we are inclined to see only symbols, and ways of giving allegorical form to the bonds contracted. But as a rule customs never assume a symbolic character in the beginning; the symbolism represents only a decadence that comes when the primary meaning of the custom is lost. Customs begin by being active causes, and not symbols, of social relations; they bring these relations into existence and it is not until later that they decline into being mere external and material indications. The transfer lying at the base of the *real* contract is known to be a real transfer and it is this that makes the contract and gives it its binding force. It is much later that it becomes simply a means of giving material proof of the existence of the contract. The same thing applies to the customs we have just examined. We are justified in relating these to the blood covenant. They, also, have the effect of binding the contracting parties by taking on their moral personality. It may be that the hand-shake (*Handschlag*) has the same origin.

Contracts of this kind, then, are made up of two elements: a verbal nucleus, which is the formula, and the outward ritual. As such, they are already nearer to the true contract than to the *real* contract. True, there must still be intermediary processes for the consent to have effects in law, but even so the wills concerned are bound direct by these very processes. In fact, these intercalated processes do not consist of actual performance, even in part, of what the contract sets out to do. Whatever the solemn ritual employed, the undertaking entered into by the two parties remain to be carried out in full, even after the rites have been observed. On both sides there are only promises and yet these promises commit the two contracting parties. This is not so with the *real* contract, since one of the two parties has already carried out his promise wholly or in part – that is, one of the two wills concerned is no

longer in a state of willing, since it has reached its object. It is true that the blood covenant had the same advantage. It is easy to see, however, that this unusually complex ritual could only serve for great occasions and not for the small affairs of everyday life. It could not be used to ratify day-to-day sales and purchases. It was hardly ever used except to create some permanent association.

The contract with solemn ritual lent itself easily to the advance that was to come about in the course of time. The outward ritual forming its cloak, as it were, tended by degrees to wear thin and disappear. In Rome, these advances came about as early as the classical era. The outward formalities of the *stipulatio* had become no more than an echo from times past; only scholars find traces of them in customs of the people and current traditions, or in the derivation of the word. But they were no longer indispensable for the *stipulatio* to be valid. It consisted exclusively of the sanctified formula that the two contracting parties had to pronounce with religious punctilio. The same phenomenon appeared in modern societies under the influence of Christianity. The Church tended more and more to make the oath the necessary and adequate condition of a contract, without further formality. Thus, the intermediary process between the agreement of the wills and the obligation to translate this agreement into fact went on shrinking. Since words are the direct expression of the will, there remained – as conditions exterior to the consent itself – no more than the clearly defined character of the formula in which this consent had to be expressed, and the particular force and qualities attaching to this formula. When this force reached vanishing point, and as a result there was no longer any insistent requirement as to the verbal form used by those contracting, then the contract proper, the consensual contract had arrived.

That is the fourth stage of this development. How then was the point reached when the contract was rid of this last extraneous and casual element? Several factors contributed to this result.

First, when exchanges in trade greatly increased in number and kind, it became difficult to keep up the practice of the solemn contract with its hampering formalities. New trading relations were set up by means of contract, which the

stereotype formulas hallowed by tradition did not fit in with. The processes of law themselves had to become more flexible to conform to the social life. When sales and purchases were going on all the time, when there was never an instant that trade was at a standstill, it was not feasible to require every buyer and every seller to take an oath or have recourse to certain formulas laid down, and so on. . . . The day-to-day character, and continuity of these relations inevitably excluded all solemn ritual, and it was quite natural to seek means to lessen or lighten the formalities and even to do away with them. But this explanation is not enough. Because these means were needed, it did not follow that they were to be found. Let us see how they appeared to the public mind at the time they were found to be necessary. The mere fact that an institution is required does not mean it will appear at a given moment out of the void. There must be something to make it of, that is, current ideas must allow it to come about and existing institutions must not oppose it but, rather, supply the material needed to shape it. So it was not enough for the consensual contract to be demanded by the advance of economic life: the public mind, too, had to be ready to conceive it as possible. Until then, it had seemed that contractual obligations could only come about by prescribed ritual or by the actual transfer of the thing. Now, a change had to be made in the region of ideas, that would allow of their having a different start. That is how the last stage in these changes was brought about.

What was it that from the outset ran counter to the notion of the consensual contract? It was the principle that any obligation under the law could only have its origin, it seemed, in a state in being of things or of persons. In itself, this principle is irrefutable. Every right has a *raison d'être* and this can only lie in some clearly defined thing, that is, in an established fact. But is it impossible for mere declarations of will to satisfy this requirement? In no wise. It is true they cannot fulfil this condition if the will that has been asserted remains free to retract. For then the will would not amount to an established fact, since it could not be known in which direction it would finally manifest itself; nor could we say with any assurance what it was or what it might become. Therefore, nothing

definite could result from it and no right could derive from it. But let us suppose that the will of the contracting party is asserted in such a way that it could not retract. In that case it will possess all the characteristics of the established fact, a fact in being and able to bring about consequences of the same kind, since it is irrevocable. I may engage to sell or lend to you a certain object, and on such terms that once the undertaking is made I have no longer the right or means to break it. If I do this, I arouse in you by this very action a state of mind equally decided and in line with the certainty you are justified in assuming about my action. You count, and legitimately so, on the promised performance. You have a right to consider it as about to take place, and you act or may act in consequence of this. You may make a certain decision or decide on a certain sale or purchase, by reason of this legitimate certainty. If I then suddenly withdraw and deprive you of this certainty, I throw you out just as seriously as if I had withdrawn after delivery of the thing I had assigned to you in making a *real* contract with you; I bring about a change in your established position and I render any transactions you may have engaged in on the good faith of the given word, ineffectual. We begin to see, too, morals ranged against this unjustified wrong.

Now, in the solemn contract, the condition we have discussed is fulfilled; the irrevocability of the will is made certain. It is the solemn ritual nature of the undertaking that gives it this characteristic, by sanctifying it and by making of it something that no longer depends on myself, although proceeding from me. The other party is thus justified in counting on my word – and vice versa, if the contract imposes mutual obligations. He has morally and legally the right to consider the promise as inevitably about to be kept. If, then, I fail in this, I am transgressing two duties at once: (1) I am committing sacrilege, because I am breaking an oath, I am profaning a sacred thing, I am committing an act forbidden by religion, and I am trespassing on the region of sacred things. (2) I am disturbing another in his possession, just as if I were a neighbour on his land; I am injuring him, or there is a danger of it. From the very moment the right of the individual is properly respected, that individual shall not be done any unmerited wrong. Thus, in a solemn contract, the formal

bond that ties the contracting parties is a two-fold one: I am bound by my oath to the deities; I have an obligation to them to fulfil my promise. But I am also bound towards a fellow-man, because my oath, by detaching my word and exteriorizing it, enables this fellow-man to possess himself of it as of a thing. There is, then, a two-fold resistance to such contracts being broken, partly in the ancient and sacred rights and partly in modern and human rights.

We can now get some idea of how these things came about. It is the second of these elements which, detached from the first and entirely rid of it (e.g. the solemn formalities), has become the consensual contract. The demands of a busier life tended to reduce the importance of ritual formalities. At the same time, however, the decline in faith lessened the value attached to them and by degrees, the meaning of many became lost. Thus, if there had been in the solemn contract no more than the legal ties originating in solemn ritual, this development would have ended in a truly backward step in contractual rights, since the undertakings contracted would henceforward have lacked any foundation. But we have just seen that there was another form of contract which managed to survive: this was the contract that has its roots in the right of the individual. It is true that this second type of bond is an offshoot of the first; for if there is already an established fact, if the spoken word assumes an objective character that removes it from the disposal of the contracting party, it is because an oath has been taken. But could this result, which used to be got in this way, now be reached by other means? It is enough to establish that the declaration of will alone was irrevocable – that is, if it was made without reservations or concealment or hypothetical conditions, if, in a word, it was represented to be irrevocable; from then onwards it could in this way have the same effect with regard to individuals as when it was hedged about with solemn formalities, and it had an equally binding force. That is to say, the consensual contract had come into existence; we must therefore derive it from the contract by solemn ritual. Whilst this ritual form of contract had taught men that undertakings could be made by a clearly defined procedure, it is true to say that this clearly defined quality came from ritual processes and liturgy. This quality was

detached from the cause that originally produced it and linked to another cause – hence a new form of contract came into being, or rather, the contract proper. The consensual contract is a contract by solemn ritual – of which the useful effects are preserved, although they are reached by a different procedure. Had it not been for the existence of the contract by solemn ritual, there would have been no notion of the contract by mutual consent. Nor would there have been any idea that the word of honour, which is fugitive and can be revoked by anyone, could be thus secured and given substance. The contract by ritual was secured only by magic and sacred processes: in the consensual form the given word acquired the same security and the same objectivity through the effect of the law alone. If we are to understand this new form of contract, we cannot proceed from the nature of the will or the words that declare it: there is nothing in the word to bind the individual pronouncing it. The binding force, the action, are supplied from without. It is religious beliefs that brought about the synthesis; once formed, other causes sustained it, because it served a purpose.

Naturally, this is a simplification, to make these matters more intelligible. The system of formalism was not done away with from one day to the next and the new principle established. It was only by very slow degrees that the solemn ceremonies lost ground, under the dual influence we mentioned: that is, the new demands of economic life and the gradual clouding over of the concepts that lay at the root of these solemn rites. It was, too, only very gradually that the new rule shed the formalistic wrappings that enclosed it. This happened only as the need for it became more urgent and when the old traditions weakened as a counter-force. The conflict between the two principles lasted a very long time. Both the *real* contract and the contract by ritual remained the basis of the Roman contractual right, which was preserved to apply only in certain cases. And clearly, there are very distinct traces of the early juridical concepts to be found well into the Middle Ages.

The contract by solemn ritual has moreover not wholly passed away. In all codes of law it still has some application. This discussion will have enabled us to understand what these

survivals amount to. The contract by solemn ritual binds men doubly; it binds them one to the other; it also binds them to the deity, if it is the deity that was party to the contract; or to the society if the society took part in the person of its representative. Further, we know that the divinity is only the symbolic form of the society. The contract in solemn ritual form therefore binds us more strongly than any other. This is why we are compelled to its use whenever the bonds to be forged are of supreme importance, as in marriage. Now, marriage is a contract by solemn ritual not just because the religious ceremonies provide the evidence and record the dates, etc. . . . It is above all because the bonds that have called forth moral values of a high order cannot then be broken at the arbitrary will of the parties. The intention is that a moral authority that stands higher should be mingled with the relationship being formed.

III

The consensual contract (or contract by mutual consent), in the final analysis, is, as it were, a climax, a point of convergence where the *real* contract and the ritual verbal contract meet in their process of development. In the *real* contract there is the transfer of a thing and it is this transfer that gives rise to the obligation; in receiving a certain object that you hand over to me, I become your debtor. In the contract by ritual, no performance takes place; everything is done by words, usually accompanied by certain ritual gestures. These words, however, are pronounced in such a way that they have hardly left the lips of the promisor when they become, as it were, exterior to him; they are *ipso facto* withdrawn from his option; he can have no more effect on them; they are what they are and he can no longer change them. They have thus become a thing, in the true meaning of the word. But then they too become transferable; they too can be alienated in some way or, like the material things that make up our patrimony, transferred to another. Those expressions still in current use – to give one's word, to pledge one's word – are not mere metaphor: they correspond in fact to a parting

with something, a genuine alienation. Our word, once given, is no longer our own. In the solemn agreement or contract by ritual, this transfer had already been achieved, but it was subject to the magic-religious processes we have mentioned, which alone made the transfer possible since it was these ceremonies that gave an objective character to the word and to the resolve of the promisor. Once this transfer sheds the ritual that was previously a condition of it and is rid of it, once it constitutes the whole contractual act in itself alone, then the consensual contract has come into existence. Now, given the contract by ritual as an existing fact, this process of cutting down and simplifying was bound to come about of itself. On the one hand we see a diminishing of the verbal or other ritual ceremonies was brought about by a kind of decline from within, under the pressure of social needs that called for greater speed in the process of exchanges. On the other hand, the practical effects of the contract by ritual could be got adequately by means other than these ceremonies; it was enough for the law to declare as irrevocable any declaration of the will presented as such: this simplification was the more easily allowed of, since in the natural course of time the practices that had accumulated had lost a great part of their meaning and early authority. It is true that the contract so reduced could not have the same binding force as the contract by ritual since in the latter the individuals are, as it were, doubly bound – bound to the moral authority that intervenes in the contract, and bound one to the other. But it was at that very time that economic life needed some loosening process to slacken the stiff knots of contractual ties; if they were to be made with greater ease, it was imperative they should have a more secular character, and the act designed for making the ties had to be freed of all traces of ritual solemnity. It was enough to reserve the solemn contract for cases where the contractual relation had a special importance.

Such then, is the principle of the consensual contract. To sum up finally, it consists in substituting for the material transfer by *real* contract a transfer that is simply oral and even, to be more exact, mental and psychological, as we shall see. Once it was established it entirely took the place of the *real* contract, which henceforth had no more *raison d'être*. The

binding force of the real contract was no greater, and furthermore, its forms were unnecessarily complex and general in terms. This is why it has left no traces in our present laws, whilst the ritual contract survives alongside the consensual contract which grew out of it.

As this principle becomes established, it brings about various changes in the contract as an institution, and these, little by little, will alter its whole aspect.

The system of the real contract and the ritual contract correspond to a stage in social evolution in which the right of individuals commands only a slight measure of respect. The consequence was that the individual rights concerned in every contract had only a very slight measure of protection. It is true the defaulting debtor often was sentenced to a penalty such as whipping, imprisonment or a fine. In China, for instance, he receives a certain number of strokes with a bamboo cane; in Japan, there is the same custom; according to ancient Hindu law, the penalty is a fine. But the rule was then still unknown, whereby the true sanction is one of compelling the contracting party either to keep his word, or to make good the loss or injury inflicted on the other party by failing to honour an undertaking. In other words, penal sanctions at this stage are only applied in respect of a contract where it appears to be an offence against the public authority: the way in which it affects the individual does not enter into consideration. For loss or injury in private cases there is no provision.

The result was that the creditor had no assurance whatever of getting his debt paid. It is no doubt this situation that is responsible for a curious custom to be seen in various countries, but especially in India and Ireland: it is generally known by the name given it in India, the '*dharna*'. In order to enforce the settlement of the debt, the creditor instals himself at the door of the debtor and threatens to let himself die of hunger there, if he does not get satisfaction. If the threat is to be taken as serious, the man who is fasting must of course be resolved on carrying it out to the end, if needs be, even to the point of suicide. We are told by Marion, in listing the legal means to compel a debtor, that . . . 'In the fourth place, there is the process of fasting, when the creditor places himself at the door of the debtor and there lets himself die of hunger'. . . .

The efficacy of the strange proceeding derives from the beliefs and sentiments connected with the dead. We know they were held in the greatest awe. They are the powers from whom the living cannot escape. It often happens, too, in the lower societies, that a suicide can be in the nature of a vendetta. It is believed that a man is avenged on his enemy with greater certainty by killing himself than by killing him. Above all, it is a method of revenge that the weak can use against the strong. A man may be able to do nothing, in this life, against some powerful character. He always has the power, in place of the earthly revenge that he cannot inflict on his enemey, to take a revenge from beyond the grave that is held to be more terrible and above all, infallible. It might even be quite possible, in the case of the *dharna* in its true sense, for the suicide to have a two-fold aim – that of immuring the debtor in his house whilst giving a magic potency to the threshold that would render it impassable. it is indeed on the threshold that the creditor instals himself and there that he dies; so it is to this spot that his spirit, once realeased from the body, will return. The spirit will keep guard over the threshold and will hinder the actual owner from crossing it. At least, he will cross it only at his peril. So that it is like a kind of mortmain put on the house, a kind of posthumous distraint.

Such a custom obviously shows that the creditor is left to his own devices to obtain satisfaction. Moreover, even in Germanic law, it is he who has to carry out the distraint. True, the law requires the debtor to allow it to be done, but the authority does not intervene on behalf of individuals and does not even assist them. This is because the specific bond contained in the contract did not have a very definitely moral character: it took on this character only in the consensual contract, for in this it forms the sum total of the relationship. Thus, the penal sanctions applying to the contract consist in essence not in requiring the public authority for some breach of the law, as by the defaulting debtor, but in ensuring for both parties the full and direct carrying into effect of the rights they had acquired.

It is not, however, only the sanctions – that is, the outer structure of the contractual right – that have been modified. The internal structure was entirely transformed.

In the beginning, the formal or ritual contract, like the *real* contract, could only be unilateral. In the *real* contract the unilateral character arose by the fact that one of the parties carried out a performance indirectly; he could therefore not be bound towards the other. There was only one debtor (the one who had received), and one creditor (the one who had delivered the thing). In the ritual contract it amounted to the same thing, for this form involves an individual who promises and one who receives the promise. In Rome, for example, it would be asked: 'Dost thou promise to do or to give this or that?' The other would reply: 'I do so promise.' To create a bilateral bond, that is, in order that there shall be an exchange in the course of the contract, in order that each contracting party shall be both debtor and creditor at once, there had to be two separate contracts, independent one of the other, for the role assigned to each was entirely different. There was of necessity an actual transposition. The one who spoke first as stipulator or creditor later on spoke as debtor and promisor, and vice versa. The independence of the two processes was such that the validity of the one was entirely distinct from that of the other. Let us suppose, for example, that I have solemnly engaged to pay a certain sum to Primius as the price of a murder that he on his part has engaged to commit: this reciprocal obligation will take shape under the terms of a ritual contract, on the strength of two unilateral contracts in succession. I shall begin by solemnly promising a sum of money to Primius, who will accept; here, I am the promisor and he the stipulator and there is no question of a murder to be carried out. Then, by another contract, he will promise to perpetrate the murder at my request. The second contract is unlawful, because the cause of it is immoral. But the first is quite lawful: therefore Roman law would consider the promise to pay the sum of money as valid in itself and there would have to be recourse to a legal subterfuge to escape the consequences.

A system of this kind could therefore not lend itself easily to questions of exchange or to reciprocal or bilateral realtions. In fact, in Germanic Row, bilateral contracts were not unknown, but they appear only as transactions on a cash basis and such a transaction is not a truly contractual one. The consensual

contract alone was able at a single stroke to create the two-way track of bonds that we find in any reciprocal agreement. For the greater flexibility of the system allows any contracting party to play at one and the same time the dual role of debtor and creditor, of stipulator and promisor. As a man is no longer under compulsion to adhere strictly to a definite formula, the reciprocal obligations can be contracted simultaneously. The two parties declare at one and the same time that they consent to the exchange on the conditions agreed between them.

Another new feature of some significance arose when consensual contracts became inevitably contracts in good faith (or *bona fide* contracts). This name is given to contracts whose range and legal effects must be exclusively determined by the intent of the parties.

The *real* contract and the consensual contract were not able to claim this characteristic, or at least, only very imperfectly. Indeed, in each case, the obligation did not come about purely and simply from the consent given or from the demonstration of will. Another factor needed to bind the parties came into it. Therefore this very factor which was indeed the decisive one, was bound deeply to affect the nature of the form of both these contracts; so it was impossible that these two forms of contract should depend exclusively or even mainly on what we might call the psychological factor, that is, the will or intention. In the case of the *real* contract there was the thing, the subject of the transfer; since the binding force of the act came from this thing, it contributed to a large extent to determining the scope of the obligation. In the Roman *mutuum*, a simple loan, the borrower was liable to repay things of the same quality and quantity as those he had received. In other words, it is the nature, kind or quantity of the things received that determine the nature, kind or quantity of the things to be repaid. This then, is the original form of the *real* contract. Later on, it is true, the *real* contract served in exchanges (in the true meaning) in which the debtor owed, not a thing equivalent to what he had received, but an equivalent value. Here, the thing played a smaller part. But the use of the *real* contract for this purpose came relatively late; when it does take this form, it means that the consensual contract is in sight. Furthermore, as we said about the Germanic law, until it did appear,

exchanges were hardly ever made except as a transaction on a cash basis. And so, even in this case, the thing delivered is no less a source of the obligation and thus, has a bearing on this obligation. It is not a matter of wondering what one of the parties had meant to deliver or what the other had meant to receive, since the delivery has been made and the thing is there, with its intrinsic value determining the value that the debtor owes to the creditor. The object speaks for itself and it is the object that decides. The role played by the thing in the *real* contract is filled by the words or the ritual used in the formal contract. Here it is the words used and the gestures that make the obligation; it is these, too, that define it. In order to know what the promisor or debtor is bound to give or to do, we must not consider his intent or that of the opposite party, but the formula he has used. The legal analysis, at least, has to start with the formula. Since it is the words that effect the binding, it is the words, too, that give the measure of the bonds forged. Moreover, even in the worst days of Roman law, the contract by stipulation had to be strictly interpreted. The intent of the parties, it is obvious, remained without effect whenever it was not possible to make it derive from the words used (Accarias, *Précis de droit romain*). For, we must repeat, the formula has a value in itself, that is, has its own force, and this force could not depend on the wills of the contracting parties since, on the contrary, the formula imposes itself on these wills. This is how a magic formula produces its effects, mechanically, as it were, no matter what the intentions of those using it. If these individuals know the way of using it best suited to their interests, all the better for them. But its action is not subject to their desires. For all these reasons, good faith and the intent of the parties hardly came into the reckoning, whether for *real* or ritual contracts. In Rome, it was only in the year 688 AUC that the action known as *dolo* was instituted, allowing the contracting party deceived by fraudulent intrigue, to get reparation for the loss or injury caused.

From the time that the consensual contract was established, however, it was a different matter. Here we no longer find anything intervening in the relation contracted and affecting its nature. Certainly there are still words being used, as a rule

at least, but these no longer have any force in themselves because they lack any sacred character. Their only value now is in giving expression to the wills they reveal and therefore in the end it is the state of these wills that decides the obligations contracted. The words in themselves are no longer of importance; they are only symbols to be interpreted, and what they signify is the state of mind and will that inspired them. We said just now that the expression 'to give one's word' was not altogether metaphorical. There is indeed some thing that we give, that we part with, that we are prohibited from changing. But strictly speaking, it is not the words pronounced which are marked *ne varietur*; it is the resolve they interpret. What I am giving to another is my firm resolve to act in a specified way: therefore it is this resolve we have to get at to know what I have given, that is, what I have pledged myself to do. For the same reason, if a contract is to be achieved, the main thing is that it shall exist in the intention or will of the party to do it. If the will is lacking on either side, there can be no contract. For what the one in fact is giving, is his intention of acting in a certain way, of transferring his ownership in a certain object; what the other declares, is his intention of accepting what is thus transferred to him. If the intention is absent, nothing remains but a form of contract empty of any positive content. All that is pronounced is words devoid of meaning and so, devoid of value. We do not have to specify the rules by which the intent of the parties has to be appraised in its influence on contractual obligations. It is enough to state here the general principle and to show how the consensual contract had to be a *bona fide* contract, and how it could not be one of good faith except on condition of its being one by mutual consent.

We can see how far the consensual contract amounts to a revolutionary innovation in the law. The dominant part played in it by consent and the declaration of will had the effect of transforming the institution. It differs from the earlier forms of contract from which it descends, by a whole series of distinctive features. By the very fact that it is consensual, the contract is covered by sanction, it is reciprocal and made in good faith. That is not all. The principle on which the institution in its new form rests, contains in itself the germ of a

whole new development. We must now trace the successive stages as well as the causes, and determine its trends.

The consent may be given in ways that differ widely, depending on the circumstances, and so may exhibit qualities that differ and that make it fluctuate in its value and moral significance. Granted that the consent was the basis of the contract, it was natural that the public consciousness came to distinguish the variations the consent could assume, to appraise them, and so finally to calculate their legal and moral bearing.

The idea governing this development is that the consent is truly itself, and binds truly and absolutely the one who consents, only on condition that it has been freely given. Anything that lessens the liberty of the contracting party, lessens the binding force of the contract. This rule should not be confused with the one that requires the contract to be made with deliberate intent. For I may very well have had the will to contract as I have done, and yet have contracted only under coercion. In this case, I will the obligations I subscribe to, but I will them by reason of pressure being put upon me. The consent in such instances is said to be invalidated and thus the contract is null and void.

To us this idea may seem a natural one but it only broke through very slowly and in the course of meeting with resistance of every kind. For centuries, the binding force of the contract had been supposed to reside reside outside the parties, in the formula pronounced, in the gesture made, in the thing delivered. Given this fact, the worth of the bond contracted could not be made to depend on what might have occurred in the depths of consciousness of the contracting parties, or on the conditions in which their resolve had been taken. It was not until the year 674 AUC, following on the dictatorship of Scylla, that an action was instituted in Rome to allow those who had been compelled under threats to contract undertakings injurious to them, to obtain compensation for this injury caused. It was the spectacle of the disorders and abuses witnessed in Rome under Scylla's reign of terror that suggested the idea. So this action came of a state of emergency but outlived it. It was given the name of *actio quod metus causa*. Its scope, by the way, was fairly limited. Let us take the case

of a contracting party being in fear of a third party. That fear could only lead to an annulment of the contract if it was associated with some extreme form of evil and of a kind to shake the strongest. The only evils held to answer to this description were death or physical torture. Later, in milder times, other fears were added to that of death: these were the fear of arbitrary bondage, the fear of a capital charge or the fear of physical assault. Fears relating to honour or fortune were, however, never taken into account. (Accarias, *ibid.*)

In the present state of our laws, the rule has been still further mitigated. To invalidate a contract, the fear no longer has to be of a kind that only a stoic can stand up to it. According to the established formula (Art. 112), it is enough that the fear should affect any ordinary person. The text even adds that regard must be had 'concerning this matter, to the age, sex and station of the persons'. The incidence of force or constraint by fear is thus quite relative: in some cases it may even be very slight. We have at last got away from the severe restraints of Roman law.

What is the source of this legal precept, whose importance we shall see directly? It is commonly said that man is a free agent and that the consent he gives can be attributed to himself only on condition of its having been freely given. Here we find ideas similar to those we meet with concerning responsibility. If the criminal has not committed an act of his own free will, it is said, this act does not derive from him and he can therefore not be blamed for it. It is the same with the contract. There is a kind of responsibility, for instance, which arises from a promise I have made, since I am bound to carry out certain acts of consequence of this promise. But the other party to whom it has been made can come to me with the demand it be kept, only if it be really I myself who has made the promise. If it has been imposed on me by a third party, it is not I myself, in reality, who is responsible; therefore I could not be bound by an undertaking that another has made, as it were, through myself as intermediary. If the one who used pressure on me be also the one who benefits by the contract, he will have, so to speak, no guarantor but himself; that is to say, such a contract becomes null and void.

But this interpretation, to begin with, errs in setting the

legal system to solve problems in metaphysics. Is man a free agent or is he not? That is a question which in fact has never had any effect on legislation and it is easy to see why the law ought not to hang on it. It is true we might think that the state of public opinion on this controversial point could now and then have contributed to deciding the spirit and letter of the law in one way or another; we might hold the view that public opinion changes according as the people believe in freedom or not. The truth is that this question has never been placed before the public consciousness in its abstract form. Almost every society has believed in something that resembles what is called freedom and at the same time in something that corresponds to what is called determinism, without either of the two concepts ever entirely excluding the other. From the advent of Christianity onwards, for instance, we find at one and the same time the theory of pre-determination by Providence, and the theory that holds every man to be the mainspring of his own faith and morality.

If man is a free agent, moreover, it seems as if he must always be in a position to refuse his consent if he so wills; hence, why should he not accept the consequences of that consent? The fact is all the more surprising and inexplicable since, in the case under review, of contract, quite slight acts of constraint are sometimes held to impair the consent. No great exertion is needed to resist that constraint. We do not allow a man to kill another to avoid some monetary loss and we make him responsible for his act. Still, nowadays we hold that the fear of an underserved monetary loss is enough to invalidate a contract and to cancel the contracted obligations due from the one who has suffered this constraint. The freedom and power to resist are, however, the same in either case. How does it come about that in the one described the act should be regarded as done by free will and consent, and that in the other it assumes a quite different nature? Well, there are many instances in which the fear is intense and leaves room for no choice, and the will is therefore pre-determined, but in which nevertheless the contract is valid. The merchant who can escape the bankruptcy he is threatened with only by contracting a loan, has recourse of this means of saving himself because he cannot do otherwise; and yet, if the lender has not

taken unfair advantage of the situation, the contract is valid morally and legally.

It is therefore not the amount of a greater or lesser freedom that matters; if the contracts imposed by constraint, direct or indirect, are not binding, this does not arise from the state of the will when it gave consent. It arises from the consequences that an obligation thus formed inevitably brings upon the contracting party. It may be, in fact, that he took the step that has bound him only under external pressure, that his consent has been extracted from him. If this is so, it means that the consent was against his own interests and the justifiable needs he might have under the general principles of equity. The use of coercion could have had no other aim or consequence but that of forcing him to yield up some thing which he did not wish to , to do something he did not wish to do, or indeed of forcing him to the one action or the other on conditions he did not will. Penalty and distress have thus been undeservedly laid on him. The feelings of sympathy that we usually have for our fellow-creatures are outraged when suffering is inflicted on someone when it is in no way deserved. The only kind of infliction that we find just is a penalty, and the penalty presupposes a culpable act. Any act must therefore seem immoral to us that causes injury to a fellow-man who has otherwise done nothing to alienate our ordinary human sympathies. We declare it to be unjust. Now an unjust act could not be sanctioned by law without inconsistency. This is why any contract in which pressure has a part, becomes invalid. It is not at all because the determining cause of the obligation is exterior to the individual who binds himself. It is because he has suffered some unjustified injury, because, in a word, such a contract is unjust. Thus, the coming on the scene of the contract by mutual consent, together with an increase in human sympathies, inclined the minds of men to the idea that the contract was only moral and only to be recognized and given sanction by society, provided it was not merely a means of exploiting one of the contracting parties, in a word, provided it was just.

What we should especially remember is that this principle was something quite new. This, in reality, is a new stage of the institution. The consensual contract pure and simple merely

means, indeed, that the consent is the necessary but sufficing condition of the obligation. This new condition is now superimposed on the other which tends to become the essential condition. It is not enough that the contract shall be by consent. It has to be just, and the way in which the consent is given is now no more than the outward criterion of the degree of equity in the contract. The state or condition of the parties, taken subjectively, is no longer the single consideration. Now, it is only the objective consequences of the undertakings contracted that have a bearing on their worth. Put in another way, just as the consensual emerged from the ritual contract, so a new form succeeded to the consensual. This is the contract of equity, that is, objectively equitable. . . . We shall see how this new principle developed and how, in developing, it was destined to have a profound effect on the present institution of property.

IV

In the same way as the contract by mutual consent sprang from the ritual and the *real* contracts, so in turn did a new form begin to grow out of the consensual. This was the just contract, objective and equitable. Its existence was revealed when the rule appeared whereby the contract is null and void when one of the parties has given his consent only under pressure of obvious constraint. The society declines to approve a declaration of will which has been got only under duress. How does this come about? We have seen how slight the foundation is for attributing the legal consequences of constraint to the fact that it suppresses the free will of the agent. Should this word be taken in its metaphysical sense? Then, if man is a free agent, he is free to resist every kind of pressure exerted on him; his freedom remains unimpaired whatever the duress he may be exposed to. Is the meaning of an act of free will simply a spontaneous act and are we to understand that consent implies that the will in consenting does so spontaneously? How often it happens that we consent because we are tied by circumstances – compelled by them, without any option of choice. And yet, when it is things and

not persons that exert this constraint over us, a contract made in these circumstances is binding. Under the pressure of illness, I have to call in a certain doctor whose fees are very high: I am just as much bound to accept them as if I had a pistol at my head. We might quote many other instances. There is always constraint in any acts we carry out and in any consent we give, for they are never exactly in line with our wishes. When we say contract we mean concessions or sacrifices made to avoid more serious ones. In this respect there are only differences of degree in the form that contracts take.

The true reason why contracts got under pressure have come to be condemned is that they cause injury to the contracting party who suffered the constraint. For it has compelled him to yield what he did not wish to, and it takes from him by force something that he owned. It is a case of extortion. What the law refuses to approve is any act having the effect of making a man suffer who might not have deserved it, that is, an unjust act. The law disallows this because the sympathy we all feel in our fellow-man rouses our opposition to suffering being inflicted on him; that is unless he has earlier committed some act that dilutes our sympathy and may even turn it into antipathy. It is because the consent has been grievous in its effect that the society considers it null and void: that the individual has not, in a true sense, been the cause of the consent he has given is not the reason. And thus the validity of the contract becomes subordinate to the consequences it may have for the contracting party.

The injustices inflicted by constraint are, however, not the only ones that may be done in the course of contractual relations. They are only a variety. The one party, by knavery or excessive shrewdness or by knowing how to make adroit use of some unlucky turn in the affairs of the other, may bring him to consent to an exchange that is utterly unjust; that is, to consent to give his services or things he may own against a payment lower than their value. We know of course that in every society and in all ages, there exists a vague but lively sense of the value of the various services used in society, and of the values, too, of the things that are the subject of exchange. Although neither of these factors is regulated by tariff, there

is, however, in every social group a state of opinion that fixes its normal value at least roughly. There is an average figure that is considered as the true price, as the one that expresses the true value of a thing at a given moment.

How this scale of values is arrived at is not for the moment our concern. All sorts of causes enter into the way it has evolved: that is, a sense of the true usefulness of things and services, of the labour they have cost, of the relative ease or difficulty in procuring them, traditions and prejudices of every kind, and so on. It remains true – and this alone matters to us for the time being – that this scale is certainly a real one, and that it is the touchstone by which the equity of the exchanges is to be judged. This normal price, of course, is an ideal price only: it very rarely coincides with the real price, which naturally varies according to circumstance; there is no official price-list to apply to every individual case. It is only a fixed point, around which there must inevitably be many fluctuations; but these cannot go beyond a certain range in any direction without seeming abnormal. We might even say that the more that societies evolve the more too does this structure of values become stable and regulated and unaffected by any local conditions or special circumstances, so that they come to assume an objective form. When every town and almost every village had its own market, the price scale varied according to the locality: each had the scale and tariff that suited it. These variations left far more lee-way to a shrewd personal ingenuity and calculation. This is why bargaining and individual prices are one of the characteristic features of petty trading and small-scale industry. The more we advance, on the other hand, the more do prices come to have an international basis: and this through the system of stock exchanges and controlled markets whose action covers a whole continent. Formerly, under the system of local markets, there had to be negotiating and a battle of wits, to know on what terms an object could be had; today, we only have to open a well-informed journal. We are becoming increasingly used to the idea that the true price of things exchanged should be fixed previous to the contract and be in no way governed by it.

Any contract, however, that diverges from these prices too

greatly must needs seem unjust. An individual cannot exchange a thing for a price lower than its value without suffering a loss that cannot be made good or justified. It is just as if the amount unlawfully withheld were extorted under threat. In fact, we hold that there is a price that is due to him, and if he is denied it without cause our conscience rebels for the reason we mentioned before. The loss of standing inflicted on him, if he has not deserved it, wounds our sense of sympathy.

It hardly matters that he does not resist the indirect constraint put upon him and that he may even voluntarily accept it. There is something about this exploitation of one man by another that offends us and rouses our indignation, even if it is agreed to by the one who suffers it and has not been imposed by actual constraint. It is the same thing, of course, if the exchange is agreed at a price higher than the true value, for then it is the buyer who has been exploited. We see here that the notion of constraint recedes more and more into the background. (A just contract is not simply any contract that is freely consented to, that is, without explicit coercion; it is a contract by which things and services are exchanged at the true and normal value, in short, at the just value.)

Such contracts must seem to us immoral: no one will deny it. For contracts to be accepted as morally binding, we have come to require not only that they should be by consent, but that they respect the rights of the contracting parties. The very first of these rights is that things and services should not be given except at the fair price. We disapprove any contract with a 'lion's share' in it, that is, one that favours one party unduly at the expense of the other; therefore we hold that the society is not bound to enforce it or, at least, ought not to enforce it as fully as one that is equitable, since it does not call for an equal respect. It is true these views, with their source in the conscience, have so far remained moral ones and have not yet greatly affected the law. The only contracts of this sort that we absolutely decline to recognize are contracts of usury. Even here, the just rate, that is, the rate for lending the money, is fixed by law and may not exceed it. For various reasons we need not examine, this particular form of unjust exploitation is

quicker to touch us and to rouse a deeper revulsion of conscience, perhaps because here the process is rather more physical and tangible.

Quite apart from the contract of usury, all regulations that are introduced in industrial law bear witness to the same need. These are designed to prevent the employer from abusing his position to get labour out of the workman on terms too much against his interests, that is to say, on terms that do not equate his true value. This is why we get proposals, whether justified or not, to fix a firm minimum wage. These are evidence that not every contract by consent is in our view one that is valid and just, even when there has been no actual coercion. In default of any regulations for a minimum wage, there are now provisions in the laws of several European countries that require the employer to insure the workman against sickness, old age and accidents. It was whilst this mood prevailed that our recent law was passed on industrial accidents. It is one of the many means employed by the legislative assembly to make the contract of labour less unjust. Wages are not fixed, but the employer is obliged to guarantee certain specific advantages to his employees. Protests are made and it is said this really amounts to giving privileges to the worker. In one sense this is quite true, but these are meant to counterbalance in part those other privileges enjoyed by the employer which leave him free to undervalue at will the services of the worker. I will not debate the usefulness attributed to these practices. It may be they are not the best or they may even work against the aim in view. No matter. It is enough to recognize the moral impulses that inspired them and whose reality they prove.

Everything goes to show that we are not at the end of this development and that our demands on this score are rapidly growing. The feeling of human sympathy, indeed, which is their determining cause, is bound to gather greater force as it takes on a more egalitarian character. We are still inclined, under the influence of all kinds of prejudices inherited from the past, not to consider men of different classes from the same point of view. We are more sensitive to the distresses and undeserved hardships that a man of a superior class may undergo, who has important duties, than to the distress and burdens of those given up to humbler duties and labours.

Everything leads us to suppose that this discrepancy in our way of sympathizing with different classes of people will tend gradually to fade away; that the misfortunes of one class will no longer seem more deplorable than the distresses of the other; that we shall consider them both as equally painful, since both are aspects of human suffering. Therefore we shall now be trying to take stronger measures to ensure that the contractual system shall hold an even balance between the two sides. We shall demand greater justice in contracts. I will not go so far as to say that the day will ever come when this justice will be absolute, when values will be exactly equated as between services exchanged. It might be said, and with reason, that it is not possible to carry it to the extreme limit. Are there not services which are beyond any adequate remuneration? Moreover, only a rough attempt can be made to make things square absolutely. But certainly, the balance of values that exists today still does not satisfy our present ideas of justice, and the more we advance the more we shall try to get near to the correct ratio. No one can set any limits to this development.

Now the supreme obstacle it comes up against is the institution of inheritance. It is obvious that inheritance, by creating inequalities amongst men from birth, that are unrelated to merit or services, invalidates the whole contractual system at its very roots. What indeed is the fundamental condition for ensuring the reciprocity of contracted services? It is this: for each to hold his own in this kind of duel from which the contract issues, and in the course of which the terms of exchange are fixed; the weapons of the contracting parties must match as nearly as possible. Then, and then alone, there will be neither victor nor vanquished; this means that things will be exchanged so as to balance exactly and to be equal in value. What the one receives will be equivalent to what he gives and vice versa. Conversely, a privileged contracting party could make use of the advantage he holds to impose his will on the other and oblige him to give the thing or service being exchanged at a price below its true value. If, for instance, the one contracts to obtain something to live on, and the other only to obtain something to live better on, it is clear that the force of resistance of the latter will far exceed that of

the former, by the fact that he can drop the idea of contracting if he fails to get the terms he wants. The other cannot do this. He is therefore obliged to yield and to submit to what is laid down for him.

Now inheritance as an institution results in men being born either rich or poor; that is to say, there are two main classes in society, linked by all sorts of intermediate classes: the one which in order to live has to make its services acceptable to the other at whatever the cost; the other class which can do without these services, because it can call on certain resources, which may, however, not be equal to the services rendered by those who have them to offer. Therefore as long as such sharp class differences exist in society, fairly effective palliatives may lessen the injustice of contracts; but in principle, the system operates in conditions which do not allow of justice. It is not only to cover certain particular points that 'lion's share' contracts can be entered into, but the contract represents the 'lion's share' system as far as any relations of the two classes are concerned. It is the general lines on which the services of those not favoured by fortune are assessed that seem unjust, because the conditions stand in the way of their being reckoned at their true social value. The inherited fortune loads the scales and upsets the balance. It is in opposition to this inequitable assessment and to a whole state of society that allows it to happen, that we get the growing revolt of men's conscience. It is true that over the centuries, the injustice could be accepted without revolt because the demand for equality was less. Today, however, it conflicts only too obviously with the attitude which is found underlying our morality.

We begin to appreciate what a signal event it was when this that we call the just contract came on the scene, and what widespread effects this concept was to have. The whole institution of property became transformed, since one of the sources of acquisition, and a principal one at that – I mean inheritance – stood condemned by this very concept. But it is not in this indirect and negative way alone that the development of contractual right tends to affect the right of property: that right is affected in a direct way. As we have said, justice demanded that services given or exchanged should not be

remunerated below their value. This principle calls forth another, its corollary: that any value received must equate a service rendered. It is of course patent that in so far as the one value falls short of the other, the privileged individual can only have secured the excess value he may enjoy at the expense of someone else. This excess from which he benefits must have been the work of someone other than himself, who has been unlawfully deprived of it. If he is to receive more, that is, more than he is entitled to, another must receive less. Hence, we get this principle: the distribution of things amongst individuals can be just only if it be made relative to the social deserts of each one. The property of individuals should be the counterpart of the services they have rendered in the society. In this principle there is nothing that offends those humane feelings which are at the heart of this particular branch of morals. For this sympathy is liable to vary in depth according to the deserts of the individual as a social being. We have greater sympathy for those who serve the collectivity better and our goodwill towards them is all the greater; here nothing prompts us to protest if they are better treated – (with certain reservations we shall touch on). Again, a distribution of property on this pattern is closely in line with the interests of the society. For the society is concerned with seeing that things should be in the most capable hands.

The working of the principle, then, that lies at the foundation of the contract conforming to equity extends beyond the contractual right, and tends to become the basis of the right of property. As things are, the primary distribution of property is according to birth (institution of inheritance). The next stage is, that property originally distributed in this way is exchanged by contracts. But it is by contracts which, inevitably, are in part unjust as a result of an inherent state of inequality in the contracting parties, because of the institution of inheritance. Thus fundamental injustice in the right of property can only be eliminated as and when the sole economic inequalities dividing men are those resulting from the inequality of their services. That is why the development of the contractual right entails a whole recasting of the morals of property. But close heed should be given to the way in which we summarily express this principle common to *real*

right and contractual right. We are not going to say that property derives from labour, as if there were a kind of logical necessity for the thing to be attributed to the one who laboured to make it, as if labour and property were one and the same. There is nothing about the bond linking the thing with the person, as we described it, that can be analysed; there is nothing about labour that compels us to infer that the thing to which this labour has been applied derives from the workman. We have already shown all the unreason of such a deduction. It is the society that makes the synthesis of these two heterogeneous terms, property and labour. It is the society that does the allocation of property and it proceeds to allocate and distribute, according to the sentiments it has for the individual and moved too, by the way it calculates the value of his services. Since this way of calculating may be governed by principles that vary greatly, it follows that the right of property is in no wise something defined once and for all, a kind of immutable concept. No, on the contrary, it is something that can go on evolving indefinitely. Even the principle just mentioned can vary, more or less, and is therefore capable of developing. (We shall be reverting to this point.) At the same time, this is how we escaped the fallacies the classical economists and the socialists fell into, when they identified labour with property. Such an identification has a tendency indeed to make the output of labour take precedence over quality. But as we have said, it is not the amount of labour put into a thing which makes its value; it is the way in which the value of this thing is assessed by the society, and this valuation depends, not so much on the amount of energy expended, as on the useful results it produces, such at least as they are felt to be by the collectivity, for there is a subjective factor there which cannot be ruled out. An idea of genius, flowering without effort and created with joy, has greater value and merit than years of manual labour.

This agreed principle, although it is now graven in the conscience of civilized nations, is still not formally recognized by the law, and it raises a practical question. What reform could make it a reality in law? One primary reform is possible at once and almost without any transition. This is the discontinuance of inheritance *ab intestat* or by next of kin and

above all of obligatory succession, allowed by our Code of Civil Law in the case of direct descent. We have seen moreover that in heritance *ab intestat*, a survival of the old right of family joint ownership, is today an archaic survival and without justification. It no longer corresponds to anything in our ethics and could be abolished without disturbing the moral structure of our societies in any way. As far as testamentary inheritance goes, it seems a more delicate matter. It is not because it is more easily reconciled with the principle we have raised. It offends the spirit of justice as much as inheritance *ab intestat* does and creates the same inequalities. Nowadays, we no longer allow a man to bequeath by will the titles or rank he acquired or the offices held in his lifetime. Why should property be any the more transferable? The position in society we have succeeded in attaining is at least as much our own creation as our fortune. If the law prohibits our disposing of the first, why should it be any different concerning the second – that is, property? Such a limitation to the right of disposal is in no way an attack on the individual concept of property – on the contrary. For individual property is property that begins and ends with the individual. It is the hereditary transference, whether by a man's Will or otherwise, that is contrary to the spirit of individualism. There are no real difficulties on this point, except when it is a question of testamentary inheritance in direct descent. Here a kind of conflict arises between our sense of justice and certain family customs that are very deeply rooted. It is clear that at the present day the idea that we could be prevented from leaving our possessions to our children would meet with very lively resistance. For our work is done quite as much to ensure their happiness as our own. That does not mean that this state of mind does not derive very closely from the present structure of property. Let us grant that there is a transfer by inheritance and in consequence an initial inequality in the economic status of individuals at the time they enter the life of the society. We then attempt to make this inequality have as little disadvantage as possible for the human beings with whom we have the closest ties; we go further, and try to make it even a positive advantage. Hence our anxiety to work for them. But if equality were the rule, this need would be of far less concern

to us. For the peril to them of facing life with no resources but their own would have disappeared. This peril comes solely from certain people being at present endowed with initial advantages, a fact that places those not so endowed in a position obviously inferior. All the same it is not unlikely that something would always remain of the right to dispose of property by will. The old institutions never disappear entirely; they only pass into the background and fade away by degrees. This one has played too great a role in history for it to be conceivable that nothing of it should survive. It would only survive, however, in a weakened form. We might for instance imagine that every head of a family would have the right to leave to his children specified portions of the heritage. The inequalities that would then continue would be so slight as not to seriously affect the working of the contractual right.

And so, it is beyond us to make any very accurate forecast on this subject, for one factor needed in making it is at present lacking. To whom, indeed, would the wealth go to that each generation would leave behind without an owner as it left the scene? When there were no longer any heirs either by birth or by right, who would then inherit? The State? It is clearly impossible to concentrate such vast resources in hands that are already so blundering and wasteful. Alternatively, a periodic sharing-out of these things amongst individuals would have to be made, or at the very least of certain things, such as those essential to labour, of the land, for instance. Surely we can imagine some form of auction, when things of this kind would be knocked down to the highest bidder. But it is obvious that the State is too far removed from things and individuals to be able to carry out tasks so vast and so complex with any competence. There would have to be secondary groups, more limited in range and closer to the facts in detail, to be able to fulfil this function. We could hardly choose any better suited to the task than the professional groups. They are well equipped to manage any particular set of interests and could branch out into all parts of the country; at the same time they would take into account the regional differences and purely local affairs. They would satisfy all the conditions for becoming in a sense, in the economic sphere, the heirs of the family.

The family was in the past better suited to ensure the

continuity of economic life as well, because it was a small group in direct touch with things and people and also itself endowed with a genuine continuity. Today this continuity no longer exists. The family is all the time in process of breaking up; it lasts only for a period and it may die out here and there. It no longer has sufficient power to link the generations one to another, in the economic sense. But only a secondary, fairly small medium can be a substitute. This can and should have greater scope than the family because the economic interests themselves have grown in importance and are found to touch every part of the country. It is not possible for any central organ to be everywhere present and everywhere active at the same moment. All these points, then, persuade us in favour of the professional groups.

Beyond these practical conclusions, this study of contractual right leads us to put forward an important point of theory. In the sphere of ethics we have just been examining, that is, in the morals of human behaviour, we usually distinguish between two very different varieties of duty. In one, they are known as duties governed by justice and in the other, they are duties governed by charity. Between the two, it is agreed there is a kind of hiatus or break in continuity. They seem to derive from ideas and sentiments that have nothing in common. In justice, there is a further division as between distributive justice and commutative justice. The second of these is the justice that governs or ought to govern exchanges, to the end that we receive always a just recompense for what we give. The first relates to the way the laws are applied and office and rank allocated or shared out by the society amongst its members. The result of all this is that there are only differences of degree amongst these various layers of morals and that they are in line with one and the same collective sentiment taken at different periods in the development of these.

To begin with, as far as a distributive justice and a commutative justice are concerned, we have seen that they mutually affect one another and are mutually involved. If exchanges are to be equitable, they have to be justly balanced, and of course the distribution of things, even if it had followed all the rules of equity to begin with, would still not remain

just, if exchanges could be contracted on unjust terms. Both are the sequel in law of the same moral sentiment – the sympathy that man has for man. It is only that this sympathy is considered in both cases from two different aspects. In the one, the feeling is against the individual giving more than he receives or rendering services that are not rewarded at their true value. In the other case, this same feeling requires that there shall be no social inequalities as between one man and another, except those that reflect their own unequal value to society. In a word, this sentiment, in both its aspects, tends to eliminate or strip away from all social sanctions every kind of physical and material inequality – all inequalities that derive from the accident of birth or from family status, leaving only those of merit.

If justice alone is in question, these inequalities of merit will still persist. But where human sympathy is concerned, even these inequalities can not be justified. For it is man a human being that we love or should love and regard, not man as a scholar of genius or as an able man of business, and so on. . . . Essentially, are not these inequalities of merit fortuitous, too? For these all men are born with – by temperament, and it seems hardly just to make them bear responsibility for them. To us it does not seem equitable that a man should be better treated as a social being because he was born of parentage that is rich or of high rank. But is it any more equitable that he should be better treated because he was born of a father of higher intelligence or in a more favourable moral milieu? It is here that the domain of charity begins. Charity is the feeling of human sympathy that we see becoming clear even of these last remaining traces of inequality. It ignores and denies any special merit in gifts or mental capacity acquired by heredity. This, then, is the very acme of justice. It is society, we find that is coming to exercise complete dominion over nature, to lay down the law for it and to set this moral equality over physical inequality which in fact is inherent in things.

However, we see that this feeling of human sympathy only comes to have this depth in some rare forms of consciousness, the highest; consciousnesses remain as a rule too feeble to go the whole way in their logical development. We have not yet

reached the day when man can love all his fellow-creatures as brothers, whatever their faculties, their intellect or their moral values. Nor has man reached the stage when he has shed his egotism so successfully that it is no longer necessary to put a tentative price on merit (a price likely to decline), with the purpose of stimulating it (the merit) and of keeping the price steady. This is what makes a complete levelling to equal values impossible today. On the other hand, it is certain that the depth of feeling of human fraternity will go on increasing, and that the best amongst men are capable of working without getting an exact recompense for their pains and their services. This is how it comes about that we go on trying to soften and tone down the effects of a distributive and commutative justice which are too strictly reckoned, which, that is, in reality remain unachieved.

This is why, as we go on, charity, in its true meaning, becomes ever more ?significant [word illegible] and so it ceases, as it were, to be optional and to go beyond what it need be, and becomes instead a strict obligation, that may be the spring of new institutions.

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